

[2020] 115 taxmann.com 350 (NCLT - Ahd.)[01-01-2020]

**IBC : Where documents produced by financial creditor clearly established 'debt' and there was default on part of corporate debtor in payment of 'financial debt', application for initiation of CIRP was to be admitted**

■ ■ ■

[2020] 115 taxmann.com 350 (NCLT - Ahd.)

**NATIONAL COMPANY LAW TRIBUNAL, AHMEDABAD BENCH**

**Bank of Baroda**

**v.**

**Riddhi Siddhi Cotspin (P.) Ltd.**

MS. MANORAMA KUMARI, JUDICIAL MEMBER  
AND CHOCKALINGAM THIRUNAVUKKARASU, TECHNICAL MEMBER  
C.P. NO. (IB) 560/7/NCLT/AHM/2018  
JANUARY 1, 2020

**Section 5(8), read with section 7, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Financial debt - Applicant bank had granted various financial credit facilities to corporate debtor - Corporate debtor defaulted in repayment of said loan - Applicant filed petition under section 7 - It was noted that corporate debtor made part payment towards outstanding loan and, thus, acknowledged debt and there existed financial debt - Whether since documents produced by financial creditor clearly established debt and there was default on part of corporate debtor in payment of financial debt, instant petition was to be allowed - Held, yes [Para 18]**

#### **CASES REFERRED TO**

*Innoventive Industries Ltd. v. ICICI Bank* [2017] 84 taxmann.com 320/143 SCL 625 (SC) (para 13) and *Mobilox Innovations (P.) Ltd. v. Kirusa Software (P.) Ltd.* [2017] 85 taxmann.com 292/144 SCL 37 (SC) (para 14).

**Raju Kothari**, Adv. for the Petitioner. **Pratik Thakkar**, Adv. for the Respondent.

#### **ORDER**

**Ms. Manorama Kumari, Judicial Member.** - Mr. S.K. Misra, Assistant General Manager, being authorised signatory of Bank of Baroda, filed this petition under section 7 of The Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "the Code") read with Rule 4 of The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as "the Rules") seeking reliefs under section 7(5)(a) and section 13(1)(a)(b)(c) of the Code.

**2.** That the applicant/financial creditor Bank of Baroda is a body corporate constituted under the provisions of the Banking Companies (Acquisition and Transfer of Undertaking) Act 1970, having its Registered office at Dena Corporate Centre, C-10, G-Block, Bandra Kurla Complex, Bandra E, Mumbai 400 051 and branch at Dhebar Road, Rajkot 360 002, Gujarat State.

**3.** During pendency of this application, Dena Bank is merged with Bank of Baroda *vide* Government of India Gazette Notification dated 2-1-2019. Accordingly cause title of the instant application is amended *vide* order 10-7-2019.

4. The respondent/corporate debtor M/s. Riddhi Siddhi Cotspin Private Limited is a company incorporated under the Companies Act, 1956 on 5-4-2013, having identification No. U17115GJ2013PTC074360, having its registered office at Jagnath Plot, Rajkot, Gujarat State. That, Authorised capital and paid up capital is Rs. 6,00,40,000/-.

5. That, the applicant bank has submitted that through its Dhebar Road Branch, Distt. Rajkot granted various financial credit facilities to the corporate debtor and disbursement was made as per the details given below:

(i) Cash Credit Hypothecation facility of Rs. 1250.00 lac

(ii) Term Loan of Rs. 243.00 lac

<i>Sl. No.</i>	<i>Facility</i>	<i>Date of disbursement</i>
01	Term Loan	27.12.2003, 28.12.2013, 31.12.2013, 6.1.2014, 29.1.2014, 13.03.2014 and 29.3.2014
02	Cash credit hypothecation limit	03.2.2014
03	Cash credit hypothecation limit	15.1.2015

Cash Credit limit was enhanced from Rs. 1250.00 lac to Rs. 1775.00 lac and term loan was reviewed at O/s of Rs. 214.65 lac (as on 1-1-2015)

6. The financial creditor has further submitted the details of amount claimed to be in default and the date on which the default occurred as per the following table:

<i>Particulars</i>	<i>Outstanding (Principal + interest + penal interest as on 07-10-2018)</i>
CCH	23,84,76,218.14
Term Loan	1,62,53,881.34
Total	25,37,30,099.48

Date on which default occurred is 30-6-2016 and date on which the account was classified as Non-Performing Asset (NPA) on 30-9-2016.

7. It is stated that the financial creditor holds first and exclusive charge on hypothecated assets viz. entire current assets including stock, book-debts, receivables and all other movable assets lying in the possession of the corporate debtor, plant and machinery and stores and spares lying in the possession of the corporate debtor created under hypothecation agreement dated 25-3-2015. That, the financial creditor holds first and exclusive charge on mortgaged properties also. That, the present Insolvency Resolution Application is filed under section 7 of the IB Code, 2016 for the purpose of initiating corporate insolvency resolution process against the corporate debtor since it has lost its substratum and is unable to repay outstanding debt. That, the corporate debtor has already committed default of its debt towards the financial creditor by non-payment of instalment and/or interest of the various financial facilities availed through its Dhebar Road Branch, Rajkot, Gujarat State.

8. The applicant bank has submitted copy of the following documents in support of their claim: —

<i>Sl. No.</i>	<i>Particulars</i>	<i>Page Nos.</i>
1	Form 1	1-12
2	Power of attorney dated 3-2-2006 and authority letter dated 12-9-2018	13-15
3	Sanction details dated 15-11-2013 and sanction letter dated 24-1-2015	16-68
4	Order dated 01-11-2017 under section 14 of the SARFAESI Act	69-71

5	Sanction details letter dated 15-11-2013	72-107
6	Demand promissory note of Rs. 14,93,00,000/-dated 26-12-2013	108
7	Letter of continuity dated 26-12-2013 for Rs. 12,50,00,000/-	109
8	Copy of agreement of hypothecation (stocks and book-debts) dated 26-12-2013 for Rs. 14,93,00,000/-	110-121
9	Text to consent clause to be executed by borrowers dated 26-12-2013	122
10	Text to consent clause to be executed by guarantors dated 26-12-2013	123
11	Power of attorney in respect of book-debts dated 24-3-2014	124-127
12	General undertaking dated 26-12-2013	128-135
13	Letter of guarantee dated 26-12-2013 for Rs. 14,93,00,000/-	136-146
14	Memorandum of agreement of mortgage dated 24-12-2013	147-159
15	Sanction letter dated 24-1-2015	160-176
16	Demand promissory note dated 25-3-2015 for Rs. 19,89,65,000/-	177
17	Letter of continuity dated 25-3-2015 for Rs. 17,75,00,000/-	178
18	Unattested memorandum of modification of hypothecation (stocks & book-debts) dated 25-3-2015	179-182
19	Letter of general lien and set off for borrowing arrangement from the borrowers dated 25-3-2015	183
20	Letter of general lien and set off for borrowing arrangements from the guarantors dated 25-3-2015	184
21	Text to consent clause to be executed by borrowers dated 25-3-2015	185
22	Text to consent clause to be executed by guarantors dated 25-3-2015	186
23	Undertaking-cum-declaration-cum-affidavit dated 25-3-2015	187
24	Power of attorney in respect of book-debts dated 25-3-2015	188-191
25	O.A. No. 717 of 2018 filed before DRT-I, Ahmedabad	192-199
26	Letter of guarantee dated 25,03.2015 for Rs. 19,89,65,000/- executed by respondent company	200-210
27	Letter of guarantee dated 25-3-2015 for Rs. 19,89,65,000/- executed by defendant Nos. 2 to 6	211-220
28	Memorandum of agreement for extension of mortgage dated 25-3-2015	221-231
29	CIBIL report	232-253
30	Statement of accounts under the Bankers' Books Evidence Act	254-419
31	Notice issued under section 13 (2) of the SARFAESI Act dated 18-10-2016	420-424
32	Notice under section 13(4) dated 3-7-2018 of the SARFAESI Act	425-434
33	O.A. No. 583 of 2017 filed before DRT-II, Ahmedabad on 30-3-2017	435-465
34	Affidavit in support of Insolvency Application	466-477
35	Written communication by the proposed interim resolution professional as set out in Form No. 2	478-479

9. Director of the respondent company filed affidavit in reply *inter alia* raising the following objections: —

(i) The corporate debtor has not been given any prior opportunity to oppose or reply to financial

creditor before filing the present petition u/s. 7 of the IB Code;

- (ii) Financial creditor has not filed the present petition in the format as prescribed under the IBC;
- (iii) The only calculation produced before the bench is statement of accounts;
- (iv) The present petition for initiation of CIRP is filed with the intention for recovery of amount;
- (v) The financial creditor does not hold proper authority to file the present petition;
- (vi) In the event the corporate debtor is allowed to do business the corporate debtor is confident to settle the outstanding instalments;
- (vii) The financial creditor has not furnished any record of default with the information utility.

### *Findings*

**10.** Heard the councils for both the sides, perused the documents annexed to the application and the reply filed by the corporate debtor.

**11.** On perusal of the records it is found that from time to time the corporate debtor has made payments towards the outstanding loan and thus acknowledged the debt. That, the last payment is made by the corporate debtor on 30th June, 2016 towards interest which is reflected in the statement at page No. 418 to the application. That, the documents filed along with the application is sufficient to prove that there exists financial debt and the application is not barred by limitation.

**12.** On perusal of the records it is found that the letter of authority dated 12-9-2018 issued by General Manager of the applicant bank authorising Mr. S.K. Misra is proper and valid.

**13.** In view of the above discussions, the Adjudicating Authority is of the considered view that there is a debt due to "financial creditor" and there is default on the part of the corporate debtor. In view of the judgment of the Hon'ble Supreme Court in *Innoventive Industries Ltd. v. ICICI Bank* [2017] 84 taxmann.com 320/143 [SCL 625](#) the Hon'ble Supreme Court while explaining sections 7 and 8 of the IB Code, observed and held as under: —

"27. The scheme of the Code is to ensure that when a default takes place, in the sense that a 'debt' becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3 (12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount.

For the meaning of "debt", we have to go to section 3 (11) which in turn tells us that a debt means a liability of obligation in respect of a "claim" and for the meaning of claim, we have to go back to section 3 (6) which defines claim to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (section 4). The corporate insolvency resolution process maybe triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under section 5 (7) as a person to whom a financial debt is owned and a financial debt is defined in section 5 (8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under section 5 (21) means a claim in respect of provision of goods or services.

28. When it comes to a financial creditor triggering the process, section 7 becomes relevant. Under the Explanation to section 7 (1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor. It need not be a debt owed to the applicant financial creditor. Under section 7 (2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed Form in 5 parts, which requires particulars of the applicant in part I, particulars of the corporate debtor in part II, particulars of the proposed interim resolution professional in part III, particulars of the financial debt in part IV and documents, records and evidence of default in part V. Under Rule 4 (3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed,

within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of section 7 (5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt" which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is complete, in which case it may give notice to the applicant to rectify the defect within seven days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within seven days of admission or rejection of such application, as the case may be.

**14.** It is also held in *Mobilox Innovations (P) Ltd. v. Kirusa Software (P.) Ltd.* [2017] 85 taxmann.com 292/144 SCL 37 (SC) as under: —

"38..... in the case of a corporate debtor who commits a default of financial debt, the adjudicating authority has merely to see the records of the information utility or other evidences produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due", i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority then the adjudicating authority may reject an application and not otherwise.....".

**15.** That, the application is found to be complete in all respect. Hence it does not warrant any rejection or dismissal.

**16.** That, the records available shows that the applicant bank had sanctioned cash credit limit and term loans to the respondent company, to be repaid within the stipulated period as per the terms and conditions agreed between the parties. That, the applicant bank had issued notice dated 18-10-2016. Records available shows that the respondent has not cared to reply the notice issued by the applicant.

**17.** In the instant application, from the material placed on record by the Applicant, this Authority is satisfied that the application is complete in all respect and the Corporate Debtor committed default in paying the financial debt to the Applicant and the respondent company has acknowledged the debt.

**18.** In the instant case, the documents produced by the Financial Creditor clearly establish the 'debt' and there is default on the part of the Corporate Debtor in payment of the 'financial debt'.

**19.** There is no dispute in the case that the petitioner is the financial creditor. The application is also furnished in the prescribed form - 1 of the Rules and the prescribed fee has also been paid. Along with the application, the applicant proposed the name of the Resolution Professional namely Mr. Atul Mittal. The Adjudicating Authority hereby appoint Mr. Atul Mittal, 174 Balco Apartment, Plot No. 58, IP Extension, Delhi - 110 092 (Email ID a.mittalmc@gmail.com) having registration No. IBBI/IPA-001/IP-00439/2017-18/10762 to act as an interim resolution professional. Form 2 of the proposed interim resolution professional has been annexed and placed at page Nos. 478-479 of the application where declaration is made that no disciplinary proceeding is pending against him with the Board or Indian Institute of Insolvency Professionals of ICAI.

**20.** In the aforesaid background and as also discussed above, the application under section 7 (2) of the IB Code is complete in all respects and there is debt due to the "Financial Creditor" and there is default on the part of the "corporate debtor". Hence, there is no alternative but to admit the application in absence of any infirmity.

**21.** In view of the above, the petitioner/financial creditor having fulfilled all the requirements of section 7 of the Code, the instant petition deserves to be admitted.

**22.** The petition is, therefore, admitted and the moratorium is declared for prohibiting all of the following in terms of sub-section (1) of section 14 of the Code: —

- (i) 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;
- (ii) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or

any legal right or beneficial interest therein;

- (iii) 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 (54 of 2002);
- (iv) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

**23.** It is further directed that the supply of goods and essential services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period. The provisions of sub-section (1) shall, however, not apply to such transaction as maybe notified by the Central Government in consultation with any financial sector regulator.

**24.** The order of moratorium shall have effect from the date of receipt of authenticated copy 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 maybe.

**25.** This Petition stands disposed of accordingly with no order as to costs.

**26.** Communicate a copy of this order to the Applicant, Financial Creditor, Corporate Debtor and to the Interim Resolution Professional.