

(2023) 05 NCLT CK 0056

In the National Company Law Tribunal

Case No : CP(IB) No.1110/MB-IV/2022; IA-376/2023 IN CP(IB) No.1110/MB-IV/2022; & IA-1743/2023 IN CP(IB) No.1110/MB-IV/2022

Future Market Networks Limited Vs Central bank of India ?

Date of Decision : 18-05-2023

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 7, 10A
Limitation Act, 1963 — Section 18, 19
Contract Act, 1872 — Section 128

Citation : (2023) 05 NCLT CK 0056

Hon'ble Judges : Kishore Vemulapalli, Member (J);Prabhat Kumar, Member (T)

Bench : Division Bench

Advocate : Arjun Sathees, Ankit Lohia, Petrushka Dasgupta, Krishna Baruah, Ankita Yadav

Final Decision : Disposed Of

Judgement

Prabhat Kumar, Member (Technical)

1. This is an application being CP(IB) No.1110/MB-IV/2022 filed by Central bank of India, the Financial Creditor/Applicant, on 18.10.2022 under Section 7 of the Insolvency & Bankruptcy Code, 2016 (I&B Code) for initiating Corporate Insolvency Resolution Process (CIRP) in the case of Future Market networks Limited, Corporate Debtor.

1.1. The financial creditor has claimed a default of Rs.21,37,46,582.75/-(Rupees Twenty-One Crores Thirty-Seven Lakhs Forty-Six Thousand Four Hundred and Eighty-Two and Seventy-Five Paise Only) as on 29.05.2022 arising from failure of principal borrower to pay and the liability of the guarantor is co-extensive with that of the borrower. The date of default is as stated in part IV on 31.03.2022 (under One-time restructuring) and date of NPA is stated as 29.12.2020 in view of RBI guidelines mandating classification of account on failure of OTR as NPA with reference to its original date.

2. The M/s Future Market Networks Limited Executed Deed of Guarantee dated 19.03.2014 to secure the credit facility availed by Unique Malls Private Limited

("Borrower") vide Sanction Letter dated 15.02.2014 and Term Loan Agreement dated 19.03.2014 with the Borrower. Further the Corporate Guarantor.

2.1. Thereafter, a default was committed by the Borrower on 30.09.2020. The Principal Borrower then requested for One Time Restructuring (OTR) under Resolution Framework for COVID-19 related Stress announced by RBI vide its circular dated 06.08.2020 and the same was sanctioned by the Applicant by executing OTR dated 21.05.2021.

2.2. Pursuant to this, the Applicant entered into a Restructuring Agreement dated 21.05.2021 with the Borrower. Further the Corporate Guarantor executed Deed of Guarantee dated 21.05.2021. However, the Borrower failed to honour the debt obligations under OTR and Borrower has defaulted towards repayment of principal and interest which have fallen due for repayment on 31.03.2022.

2.3. Thereafter, because of default towards non-payment of principal and interest, the said accounts of the Borrower were downgraded to SMA-2 category with effect from 31.03.2022 and because of continuous default for 30 days from the date of default i.e. 31.03.2022, the accounts have slipped to NPA on 30.04.2022.

2.4. Under RBI guidelines on Resolution Framework for COVID-19 related stress dated 06.08.2020 & 07.09.2020, If the borrower is in default with any of the signatories to the ICA (Inter Creditor Agreement) at the end of the review period, the asset classification of the borrower with all the lending institutions, including those who did not sign the ICA, shall be downgraded to NPA from the date of implementation of Resolution plan or the date from which the borrower had been classified as NPA before implementation of the Plan, whichever is earlier.

2.5. Since OTR has failed in the account, the actual date of NPA was ascertained at 29.12.2020 (90 days from actual date of actual default i.e, 30.09.2020). Further as the OTR has failed in the account, all the concessions pertaining to the OTR sanction have been withdrawn and the dues have been calculated manually as per the sanction prior to the implementation of OTR.

2.6. Prior to the implementation of One Time Restructuring (OTR) in the account as per the OTR sanction, the loan account of Corporate Debtor slipped to NPA on 31.03.2021, the CBS system has applied the interest in the account till March 2021 as per the existing sanction (Sanction prior to OTR). And the Financial Creditor have taken outstanding as on 31.03.2021 and calculated the dues in all the account.

2.7. On 04.05.2022, the Applicant sent a default notice dated 04.05.2022 to the Borrower informing them of their default and calling-forth for making payments of the outstanding dues. Further, demand notice dated 06.06.2022 was sent to the Corporate Guarantor calling-forth to make payment of the outstanding dues as per the guarantees executed. The Borrower replied to the said default notice

vide letter dated 07.06.2022; acknowledged their liability therein; and sought time to repay the outstanding dues.

2.8. The FITL principal amount has been disbursed towards servicing of the Interest of the Original Term Loan account of the Company during the moratorium period allowed from November 2020 to February 2022 as per the OTR sanction terms. The Actual interest dues including penal interest towards the term loan account of the company as of 29.05.2022 would be Rs.4,85,05,665.82, if the said FITL of Rs. 2,73,00,000.00 would not have been disbursed for servicing the interest of the three Term Loans during the moratorium period allowed from November 2020 to February 2022 as per the OTR sanction terms. The details of default amounts are as under –

ACCOUNT NO.

FACILITY

LIMIT (IN CRS)

PRINCIPAL OUTSTANDING (In Rs.)

3332497854

Term Loan

187.50

16,52,40,816.93

5106598833

FITL

2.73

2,73,00,000.00

TOTAL

19,25,40,816.93

2.9. As per OTR sanction, default amount is as follows :-

ACCOUNT NO.

INTEREST DEFAULT

(RS)

PRINCIPAL DEFAULT

(RS)

TOTAL DEFAULT

(RS.)

3332497854

17,55,182.00

17,63,63,902.43

17,81,19,084.43

5106598833

1,86,657.08

2,73,00,000.00

2,74,86,657.08

19,41,839.08

20,36,63,902.43

20,56,05,741.51

2.10. The relevant clause(s) of the Guarantee Agreement executed by the Corporate Debtor reads as –

2.10.1. Clause 14 of Deed of Corporate Guarantee dated 19.03.2014 states that Guarantor affirm, confirm and declare that any balance confirmation and/or acknowledgment of debt and/or admission of liability given or promise or part payment made by the Borrower or authorized agent of the Borrower to the Bank shall be deemed to have made and/or given by or on behalf of the guarantor themselves shall be binding upon each of them.

2.10.2. Clause 22 of Deed of Corporate Guarantee dated 19.03.2014 states that the Guarantor agree that any admission or acknowledgement in writing signed by the borrower of the liability or indebtedness of the Borrower or otherwise in relation the credit facilities and/or any part payment made by the Borrower towards the principal sum hereby guaranteed or any judgement/ order obtained by the Bank against the Borrower shall be binding on the Guarantor and shall accept the correctness of any statement of account served on the Borrower which is duly certified by any authorized officer of the Bank and the same shall be binding and conclusive as against the guarantor, and further agrees that if the Borrower making an acknowledgement or making a payment the borrower shall in addition to his personal capacity be deemed to act as a guarantor duly authorized agent in that behalf for the purpose of section 18 and 19 of the Limitation Act, 1963”

2.10.3. Clause 6 of the Guarantee Agreement dated 21.05.2021 specifies “It is also agreed that any admission or acknowledgement in writing by the borrower of the amount of indebtedness of the Borrower or otherwise as in relation of the subject matter of this Guarantee, shall be binding on us and we accept the correctness of any statement of account served on the Borrower which is duly

certified by any authorized officer of the lender and the same shall be binding and conclusive as against us also, and we further agree that in making an acknowledgement or making a payment the borrower shall be treated as our duly authorized agent for the purpose of Indian Limitation Act, 1963".

3. The Corporate Debtor has filed written submission/affidavit in reply 28.04.2023; 09.05.2023 and 03.05.2023 stating that :

3.1. The claim of the Applicant is hit by section 10A of the Insolvency and Bankruptcy Code, 2016. The date of NPA as stated in the Petition is 29th December, 2020 and hence the same falls within the ambit of Section 10A of the Code. It is the Financial Creditor's own case in the Company Petition that a default was committed by the Borrower on 30th September 2020 and OTR was sanctioned on 21st May, 2021. In accordance with the RBI Guidelines on Resolution Framework for Covid-19 related stress dated 6th August, 2020 and 7th September, 2020 the actual date of declaration as NPA was ascertained as 29th December, 2020 (90 days from actual date default i.e. 30th September, 2020), since OTR had failed in the account.

3.2. The Principal Borrower is capable of making payments towards the loan and has been making regular payments as per settlement reached between the parties. The Principal borrower has already paid an amount of Rs. 4.5 Crores to the Financial Creditor towards the outstanding debt of Rs. 21.37 Crores. Therefore, the present Company Petition is infructuous. The Corporate Debtor on 15th September, 2022 deposited an amount of Rs. 2.5 Crores as an "Upfront Amount" in a no lien account with the Respondent Bank towards the Settlement of dues and addressed a letter to the Financial Creditor on 15th September, 2022 informing the Financial Creditor about the deposit, evidencing the UTR payment numbers PUNBR52022091516422979 (Rs. 1.5 Crores) and CMS2582226038528 (Rs. 1 Crores). It is further stated that the Principal Borrower on 30th November, 2022 and 30th December, 2022 deposited sums of Rs. 1 Crore each as an "Additional Amount" in the No-Lien Account with the Financial Creditor and addressed letters informing the Financial Creditor about the payment, evidencing the UTR Payment Numbers PUNBR52022113018929779 and PUNBR52023010210035820 respectively.

3.3. The Financial Creditor has filed as many as five (5) different petitions against the Principal Borrower, Corporate Guarantors and the Personal Guarantors seeking enforcement of the same debt. Thus, the present Company Petition is filed only as a pressure tactic for recovery and not filed in the spirit of IBC, 2016.

3.4. The Financial Creditor is not a Creditor in the books of the Corporate Debtor and the Corporate Debtor only by means of security and not as principal obligor, executed Deed of Guarantee dated 19th March, 2014, in favour of the Financial Creditor dated in respect of the said loan facilities.

3.5. That notwithstanding the above, it is well settled that the Insolvency and

Bankruptcy Code, 2016 is a beneficial legislation which puts the corporate debtor back on its feet and is not mere recovery legislation for creditors and the same has been upheld by the Hon'ble Supreme Court of India in *Mobilox Innovations Pvt. Ltd. v. Kirusa Software Pvt. Ltd.* (2018) 1 SCC 353, *Transmission Corporation of Andhra Pradesh v. Equipment Conductors and Cables*, (2019) 12 SCC 697; *Swiss Ribbons Pvt. Ltd. v. Union of India & Ors.* (2019) 4 SCC 17 and *Invent Asset Securitisation and Reconstruction Pvt. Ltd. v. Girnar Fibres Ltd.* 2022 SCC OnLine SC 808.

4. The Corporate Debtor has also filed IA-376/2023 & IA-1743/2023 seeking dismissal the petition on the ground that (a) the petition is not maintainable under Section 10A of the Code; and (b) the primary borrower has submitted the proposal to the Financial Creditor for settlement and in pursuance thereto has already deposited a sum of Rs. 8,00,00,000/- on 02.05.2023 and further balance of Rs.4,75,40,816.93 is to be deposited within two weeks from 02.05.2023 upon execution of the released deed and return of the title/security documents executed in favour of Financial Creditor for which a request vide letter dated 29.04.2023 has already been submitted with the Financial Creditor.

4.1. At last, it was submitted in IA 1743/2023 that the entire amount Rs. 21,37,46,482.75/- (which is inclusive of interest) as mentioned in Part IV of the Company Petition claimed in the present Petition against the Financial Creditor is repaid by the Primary Borrower. In view of the above circumstances, and particularly since the entire alleged default of Rs 21,37,46,482.75/-, as per the Financial Creditors claim in the Company Petition itself, has already been paid by the Primary Borrower towards the abovementioned facility, it is only just and equitable that the present Company petition be dismissed at the outset with appropriate direction be passed to the financial creditor to return all the security documents pertaining to the said facility.

5. The Financial creditor has filed a written submission stating that Section 128 of the Indian Contract Act, 1872 (ICA) clearly stipulates that liability of guarantor shall be co-extensive with that of the principal borrower and this is reiterated in Clause 1 of the Deed of Guarantee dated 21.05.2021 entered into between the Applicant and the Respondent. Hon'ble Supreme Court in *Laxmi Pat Surana v. Union Bank of India and Anr.* (Civil Appeal No. 2734 of 2020) has held in the judgement dated 26.03.2021 that when the principal borrower has committed a default, it would enable the creditor to proceed against both the principal borrower and the guarantor simultaneously since the obligation of the guarantor is co-extensive and coterminous with that of the principal borrower to defray the debt as prescribed under Section 128 of the ICA.

5.1. All the One-Time Settlement proposals given by the Applicant were after the present Company Petition was filed and was therefore not annexed and accordingly could not be brought to the notice of this Hon'ble Tribunal.

5.2. There is no prohibition, express or implied, under the provisions of the Code

and the Rules and Regulations framed thereunder that prohibits a creditor from initiating insolvency proceedings on the sole ground that they are secured creditors.

5.3. There is only one collateral security in the form of a mortgage on the immoveable property comprised of ground plus first floor of a Mall situated at Taluka City, Ahmedabad (Mortgaged Property), owned by the Applicant; the Respondent is not required under law to compulsorily enforce their security interest before initiating an action under the provisions of the Code; and the Respondent has consciously chosen to adopt the route under the Code to attempt the revival of the Corporate Debtor.

5.4. The Applicant has alleged that the claim of the Respondent is barred by Section 10A of the Code. Section 10A is not applicable to the present petition as the date of default has been ascertained as the date on which the terms of the OTR were defaulted i.e., 31.03.2022. The Respondent has taken the NPA as 29.12.2020 instead of 30.04.2022 in compliance with Clause 48 of Annex of the Resolution Framework for COVID-19 related Stress announced by RBI vide its Circular dated 06.08.2020 (RBI Circular). That Clause 48 of the Annex to the aforesaid RBI Circular deals with the procedure to be followed if the restructuring package is defaulted on by the borrower. Clause 48 is reproduced hereinbelow for easy reference:

"48. If the borrower is in default with any of the signatories to the ICA at the end of the Review Period, the asset classification of the borrower with all lending institutions, including those who did not sign the ICA, shall be downgraded to NPA from the date of implementation of the resolution plan or the date from which the borrower had been classified as NPA before implementation of the plan, whichever is earlier."

5.5. The OTS proposal submitted by the Applicant, the principal borrower, and the personal guarantors, Unique Malls Pvt Ltd, the principal borrower was declined by the Respondent vide Letter dated 06.08.2022.

5.6. The principal borrower sent Letter dated 06.08.2022 proposed to monetize the Mortgaged Property and repay the entire principal outstanding alongwith interest by 31.03.2023, provided the Respondent agrees to withdraw all the proceedings against the principal borrower, and its guarantors. In furtherance of their proposal the principal borrower informed the Respondent vide Letter dated 15.09.2022 that the principal borrower has deposited INR 2,50,00,000/- . However, it was communicated that the financial creditor is not undertaking to withdraw any proceedings initiated against the principal borrowers and its guarantors, and required the principal borrower to forthwith pay the entire outstanding dues.

5.7. That as per the terms of the OTR and the Restructuring Agreement, the Principal Borrower was to repay the entire outstanding of Term Loans aggregating to Rs. 17.67 Crores and Rs. 2.73 crores towards Funded Interest

Term Loan ("FITL") created for servicing interest during the period between November 2020 to February 2022, by way of bullet repayments on 31.03.2022. That the Principal Borrower breached the terms and conditions of the OTR Sanction Letter and the Restructuring Agreement by defaulting on the due date being the Bullet repayment date 31.03.2022 under the OTR. That thereafter the Financial Creditor issued Notice dated 04.05.2022 to the Principal Borrower and to the Corporate Debtor intimating of the default committed by the Principal Borrower, and for claiming the recovery of the outstanding loan amount. That the Principal Borrower through its advocates replied vide Letter dated 07.06.2022 categorically acknowledging the default under the OTR. Further, that the Principal Borrower had requested for 4 weeks' time to come up with a settlement proposal.

6. The Financial Creditor, vide its Affidavit-in-Reply dated 15.04.2023 filed in response to IA no. 376 of 2023, has submitted that Section 10A is not applicable to the present petition as the date of default has been ascertained as the date on which the terms of the OTR were defaulted i.e., 31.03.2022. The Financial Creditor has taken the NPA as 29.12.2020 instead of 30.04.2022 in compliance with Clause 48 of Annex of the RBI Circular for COVID-19 related Stress dated 06.08.2022. Therefore, the date of default will remain 31.03.2022 thereby rendering 10A of the Code inapplicable to the present petition. However, in the present case there has been a restructuring pursuant to which a Restructuring Agreement was entered into between the parties and under the terms of the said Restructuring Agreement a default was committed by the Corporate Debtor, which is the event that has given rise to the cause of action in the present Company Petition and therefore the date of default has not shifted.

6.1. That in Jagdish (supra) the Hon'ble NCLAT equated date of default with date of NPA only because no separate and specific date of default was mentioned in the petition filed by the bank. Accordingly, the Hon'ble NCLAT placed reliance on the Hon'ble Supreme Court's judgment in Babulal Vardharji Gurjar v. Veer Gurjar Aluminium Industries Private Limited (Civil Appeal No.6347 of 2019; Judgement dated 14.08.2020) which involved similar facts where no separate date of default was mentioned in the petition. The Financial Creditor submits that the Hon'ble Supreme Court has clarified in Dena Bank (now Bank of Baroda) v. C. Shivakumar Reddy and Anr. (Civil Appeal No. 1650 of 2020; Judgement dated 04.08.2021) in paras 101-111, that the cause of action under a Section 7 petition will arise from the date of default, and in doing so differentiated the judgement in Babulal (supra) by holding that where the company petition mentions a separate date of default and date of NPA, the date of default is to be considered as the marker for the cause of action.

7. The Corporate Debtor on 17.04.2023 apprised this Hon'ble Tribunal that the Principal Borrower has paid an amount of Rs. 6.5 Crores towards Principal outstanding. Subsequently, the present Company Petition was reserved for Orders on 28.04.2023. Thereafter, the Corporate Debtor through its advocates filed Application bearing No. 1743 of 2023 along with Additional Affidavit dated

03.05.2023 to bring on record that the entire principal outstanding of Rs. 19,25,40,816.93/- was paid by the Principal Borrower, Unique Malls. Thereafter, the balance interest amount, as mentioned in the Company Petition was paid on 08.05.2023 by the Principal Borrower. As such, the entire amount mentioned in the Company Petition i.e., Rs. 21,37,46,482.75/- stands paid by the Principal Borrower.

8. The Financial Creditor confirmed having received the whole amount stated in the Petition. It further submitted that however, an amount of Rs. 3,08,54,510.80/- is outstanding as on date towards interest accrued for the period from date of filing the Company Petition till present date (calculated as on 30.04.2023), which is also payable by the Corporate Debtor and principal borrower. Further, that the value of the mortgaged property over which the Financial Creditor has a first charge, amounting to Rs. 80.55 Crores, is more than sufficient to cover the remaining interest payable as well.

9. This Bench heard the counsel(s) and perused the material available on record.

9.1. This Bench finds that both the parties have acknowledged that a payment of Rs. 21,37,46,482.75/- stands paid by the Principal Borrower. This amount is claimed as amount in default of the Corporate Debtor in the present application. The financial creditor has submitted that an amount of Rs. 3,08,54,510.80/- is outstanding as on date towards interest accrued for the period from date of filing the Company Petition till present date (calculated as on 30.04.2023), which is also payable by the Corporate Debtor and principal borrower. Further, that the value of the mortgaged property over which the Financial Creditor has a first charge, amounting to Rs. 80.55 Crores, is more than sufficient to cover the remaining interest payable as well.

9.2. This Bench notes that the Hon'ble Supreme Court in the Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors (2019) ibclaw.in 03 SC held that It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. In this case, it is undisputed fact that the financial creditor has received total amount claimed in default in the present application from the principal borrower, hence, no claim is outstanding against the corporate guarantor. The question whether the interest subsequent to the period to the filing of present application can be claimed in the present petition and made the basis for making a claim of default in the hands of corporate debtor can not be decided in the present petition, as the proceedings under the Code are meant for resolution of defaulting corporate debtor and not for determination of what is due from the corporate debtor. Further, in the case of M Suresh Kumar Reddy Vs. Canara Bank & Ors. (2023) ibclaw.in 67 SC, the Hon'ble Supreme Court distinguished the decision in case of Vidharbha Industries Power Limited vs Axis Bank Limited reported in 2022 SccOnline SC 841 wherein it was

held that the Hon'ble NCLT ought to exercise its discretion to not admit the present Company Petition, and rejected the appeal noting that "Even assuming that NCLT has the power to reject the application under Section 7 if there were good reasons to do so, in the facts of the case, the conduct of the appellant is such that no such good reason existed on the basis of which NCLT could have denied admission of the application under Section 7". Upon consideration of decisions in the case of Swiss Ribbons (Supra), Vidarbha Industries (Supra), and M Suresh Kumar Reddy (Supra), this Bench feels even if debt and default exists, a distinction is to be drawn whether the application filed by the financial creditor is in realm of recovery or it seeks the resolution of the corporate debtor, as held in the case of Swiss Ribbons (Supra) and other decisions, and this proposition still holds the ground even in the light of decision in the case of M Suresh Kumar Reddy (Supra).

9.3. In the present case, the financial creditor has admitted of having received full amount as claimed in default in the present application. The financial creditor is making claim for interest accruing for the period succeeding to filing of the present petition. In our view, the conduct of the financial creditor leads us to the conclusion that the present application is intended as tool to recover the remaining amount of interest accruing for the period succeeding to filing of the present petition and is not intended to seek resolution of the corporate debtor.

10. In view of above discussion, this Bench is of considered view that the IA-1743/2023 deserves to be allowed, and consequent to this, IA-376/2023 becomes infructuous. Both the IAs are disposed of accordingly. CP(IB)No.1110/MB-IV/2022 stands dismissed.

11. It is clarified that this bench is refraining from adjudicating upon the ground of application of section 10A at this juncture in view of debt claimed in default standing settled as on date.