

(2020) 01 NCLT CK 0018
In the National Company Law Tribunal
Case No : CP (IB) No. 272/Chd/J&K/2018

Jammu And Kashmir Bank Ltd.

APPELLANT

Vs

Mir Kings Industries Pvt. Ltd

RESPONDENT

Date of Decision : 22-01-2020

Acts Referred:

Insolvency And Bankruptcy Code, 2016 — Section 7, 7(5), 9, 14(1), 16(5), 17, 13(1)(b), 18(1)(f)
Securitisation And Reconstruction Of Financial Assets And Enforcement Of Security Interest Act, 2002 — Section 13(2)
Bankers Book Evidence Act, 1891 — Section 2(A)(a), 2(A)(b)
Insolvency And Bankruptcy (Application To Adjudicating Authority) Rules, 2016 — Rule 4, 4(1)

Citation : (2020) 01 NCLT CK 0018

Hon'ble Judges : Ajay Kumar Vatsavayi, J; Pradeep R. Sethi, Member (Technical)

Bench : Division Bench

Advocate : Mayank Mathur, Aalok Jagga, A.P.S. Madaan

Judgement

6. As per Part IV of Form 1, the following credit facilities were payable by the corporate debtor." , , , ,

Sr. No., Nature of Facility, Limit Sanctioned, Rate of Interest, Debt Fell Due (Devolvement Date)

1., Term Loan, 1625.00, 14.25%, 01.01.2016

2., Cash Credit, 1650.00, 14.25%, 01.01.2016

executed by the promoters of M/s Mir Steel Rolling Mills Pvt. Ltd., who represented themselves to be the partners of M/s Buildtech Industries Unit-I." , , , ,

The agreement relates to take over of three companies by these promoters and it is stated that the Purchasers of the company M/s Buildtech , , , ,

Industries had applied for credit facilities with the petitioner-bank. It is the contention of the respondent that the petitioner-bank was aware of the , , , ,

agreement to sell and never raised any objection with regard to the execution or the sanctity of the said agreement, while considering the proposal",,,,

submitted by M/s Buildtech Industries for take over and purchase of the company. It is also submitted that One Time Settlement Proposal from the,,,,

side of respondent was moved before the petitioner-bank and Rs. 84 Crores was finalized as full and final settlement of Mir Groups and Associate,,,,

Accounts. Copy of the OTS Proposal letter dated 05.08.2017 is at Annexure R-4 of the reply. It is also informed that during the pendency of the OTS,,,,

Proposal, on 27.10.2017 a letter by the petitioner-bank was received by the respondent, stating that OTS made with the Group on 05.08.2017 has",,,,

expired because the payment has not been released and therefore, the OTS stands cancelled. Copy of letter dated 27.10.2017 is also appended with",,,,

the reply as Annexure R-7.,,,,

14. It is also submitted that a decree of mandatory injunction was sought to grant sanction to pending proposal submitted by the expected purchase of,,,,

the property i.e. M/s Buildtech Industries so that OTS dated 05.08.2017 may be carried out successfully. Copy of the civil suit is at Annexure R-11 of,,,,

the Reply.,,,,

15. Rejoinder was filed, vide Diary No. 6094 dated 04.11.2019, wherein the contentions of the respondent-corporate debtor as filed in the reply has",,,,

been denied. It is submitted that respondent-corporate debtor is wrongly trying to club all the group companies as mentioned in the table given in the,,,,

reply and it is stated that all companies and individuals are in fact separate entities, containing own terms, have availed different credit facilities from",,,,

the petitioner-financial creditor. It is also submitted that the averments made in Paragraph Nos. 4 and 5 of the reply, do not pertain to the instant",,,,

petition which has been filed by the petitioner-financial creditor. It is also submitted that a working capital facility was also availed by the respondent-,,,,

corporate debtor. It is also contended that due to the default in the repayment of the loan account, the respondent-corporate debtor account was",,,,

classified as NPA in accordance with the RBI Guidelines. In relation to the OTS sanction, the petitioner-bank has stated that as no amount was",,,,

deposited in the loan accounts, the bank was forced to revoke such sanction. It is also contended that the officers of the petitioner-bank never",,,,

interfered into the business premises except for enforcement of its statutory

rights of recovery. It was also denied that Bilal Hussan Anim and Safdar,,,,
 Ali Wani were the prospective purchasers of the unit and there was never any
 settlement between the parties to the suit filed by Bilal Hussan Anima,,,,
 and Safdar Ali Wani, before Sub Judge Pulwama, which resulted in any execution
 of the agreement to sell and it is also stated that the agreement was",,,,,
 never duly stamped nor registered and the matter is still pending adjudication
 before the Sub Judge Pulwama.,,,,,

16. We have heard the learned counsel for the petitioner and the learned counsel
 for the respondent and have carefully perused the records.,,,,,

17. The Hon'ble Supreme Court in the case of Innoventive Industries Ltd. v.
 ICICI Bank; (2018) 1 SCC 407, held as under:â?"" ,,,,

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 â??debtâ?, 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 â??claimâ? and for the meaning of",,,,,
 â??claimâ?, we have to go back to Section 3(6) which defines â??claimâ? 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 may be 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 owed,,,,
 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 incomplete, in which case it may give notice to the",,,,

applicant to rectify the defect within 7 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 7 days of admission or rejection of",,,,

such application, as the case may be.",,,,

29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a",,,,

default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code.",,,,

Under Section 8(2), the corporate debtor can, within a period of 10 days of

receipt of the demand notice or copy of the invoice mentioned" ,,,,

in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or" ,,,,

arbitration proceedings, which is pre-existing-i.e. before such notice or invoice was received by the corporate debtor. The moment there is" ,,,,

existence of such a dispute, the operational creditor gets out of the clutches of the Code." ,,,,

18. Section 7(5) of the Code reads as under:â?" ,,,,

(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. ,,,,

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5). ,,,,

(7) The Adjudicating Authority shall communicate- ,,,,

(a) the order under clause (a) of sub-section (5) to the financial creditor and the corporate debtor; ,,,,

(b) the order under clause (b) of sub-section (5) to the financial creditor, within seven days of admission or rejection of such application, as" ,,,,

the case may be. ,,,,

19. Section 7(5) of the Code provides for admission of the application where the Adjudicating Authority is satisfied that (a) a default has occurred; (b) ,,,,

the application under sub-section (2) of Section 7 is complete; (c) there is no disciplinary proceedings pending against the proposed Resolution ,,,,

Professional. The satisfaction of the three conditions is being examined below. ,,,,

20. The first condition is that a default has occurred. The default in repayment of

debt is supported by account statements filed by the bank at,,,,,

Annexure P6 and certificate under Section 2(A)(a) and 2(A)(b) of Bankers Book Evidence Act, 1891 in support of the account statements appended" ,,,,

with the petition. It is the case of the respondent-corporate debtor that the account of the respondent-corporate debtor was wrongly declared as NPA,,,,,

while OTS proposal was kept pending by petitioner-bank. It is stated by the petitioner-bank that no payment has been made towards the settled,,,,,

amount and the bank has revoked such proposal accordingly. Thus, we do not see any merit in the contention of the respondent-corporate debtor" ,,,,

and pendency of any OTS cannot be an embargo in triggering the provisions under the Code.,,,,

21. The respondent-corporate debtor mainly contended that there was a pre-existing dispute between the parties, basing on two civil suits, pending" ,,,,

against the applicant-bank. It was further contended that in view of the interim orders passed in the said suits, the petitioner cannot initiate the instant" ,,,,

CIRP proceedings. The Civil Original Suit filed by the respondent-corporate debtor (Plaintiff No. 4 in the suit) along with Mir Steel Rolling Mills Pvt.,,,,

Ltd. and others (Annexure R-11 at Page 45 of the reply) was filed seeking a declaration that the revocation of sanction of OTS proposal is null and,,,,,

void and for other consequential reliefs. Firstly, it is to be seen that the said suit was filed not for a declaration that respondent-corporate debtor is not" ,,,,

liable to pay the debt due to the applicant-bank but on the other hand to compel the bank to accept its OTS proposal, which is more than Rs. 1 lac." ,,,,

Even by way of the said suit, the respondent-corporate debtor admitted its liability to pay the debt to the applicant-bank, which is more than Rs. 1 lac." ,,,,

Therefore, in our view, the pendency of the said suit cannot be a predicament to initiate CIRP against the respondent-corporate debtor." ,,,,

22. In *Karan Goel v. Pashupati Jewellers*; CA (AT) (INS) No. 1021/2019, dated 01.10.2019, the Hon'ble National Company Law Appellate" ,,,,

Tribunal, held that "merely because a suit has been filed by the appellant and pending, cannot be a ground to reject the application under Section 7" ,,,,

of the I&B Code. Pre-existing dispute cannot be a subject matter of Section 7, though it may be relevant under Section 9 of the I&B Code." ,,,,

23. Further, the other contention raised by the respondent-corporate debtor that the stay order dated 26.06.2018 passed in the above referred suit" ,,,,

(Annexure R-12 Page 56 of the reply) is a bar to this adjudicating authority to entertain the instant CP, is also unacceptable. The Court of Principal",,,,,

District Judge, Pulwama, in the above suit, restrained the applicant-bank from taking any kind of action vis-À-vis recovery of the outstanding loan and",,,,,

not to take any coercive measures and to make any publication of the names of the plaintiff-company, promoters, directors, guarantors and co-",,,,,

borrowers to their person and property in the print and electronic media.,,,,,

24. As held by the Hon'ble NCLAT, in Binani Industries Limited v. Bank of Baroda; CA No. 82 of 2018 â??CIRP is not a money claim nor a",,,,,

suit or litigation.â? Hence, the interim order dated 26.06.2018 cannot come in the way of this Adjudicating Authority in initiation of CIRP against the",,,,,

respondent-corporate debtor, if all other requirements of the Code are satisfied.",,,,,

25. With regard the Suit (Annexure R-13 and R-14 of the Written Statement) filed by Bilal Hassan Anim and Another, the said suit was not for any",,,,,

declaration that the respondent-corporate debtor was not liable to pay any amount more than Rs. 1 lac to the petitioner. Further, since, admittedly, the",,,,,

interim order dated 22.02.2019 was stayed by the Principal District Judge, Pulwama, in an appeal filed by the applicant-bank and also for the above",,,,,

referred reasons, the pendency of the said suit also cannot be treated as a predicament to initiate CIRP.",,,,,

26. The second condition is that the application under Section 7(2) is complete. We have discussed the contents of the application above and we,,,,

conclude that the application is complete.,,,,,

27. The third condition is that there are no disciplinary proceedings pending against the proposed Resolution Professional. In the present case, Shri",,,,,

Neeraj Bhatia, IBBI/IPA-001/IP-P00824/2017-18/11400, has been proposed as interim Resolution Professional. Form 2 filed by the proposed Interim",,,,,

Resolution Professional is at Page 92 to 92A of the petition. Shri Neeraj Bhatia has certified that there are no disciplinary proceedings pending against,,,,

him with the board or Indian Institute of Insolvency Professional of ICAI. He has also affirmed that he is eligible to be appointed as a Resolution,,,,

Professional in respect of the corporate debtor in accordance with the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for,,,,

Corporation Persons) Regulations, 2016.",,,,,

28. In view of the satisfaction of the conditions provided for in Sections 7(5) of the Code, the petition for initiation of CIRP in the case of M ir Kings",,,,,

Industries Private. Ltd. is admitted.,,,,,

29. We declare the moratorium in terms of sub-section (1) of Section 14 of the Code, as under:â?"",,,,,

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 Securitization 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.,,,,,

30. It is further directed that the supply of essential goods or services to the corporate debtor as may be specified, shall not be terminated or",,,,,

suspended or interrupted during moratorium period. The provisions of Section 14(3) shall however, not apply to such transactions as may be notified by",,,,,

the Central Government in consultation with any financial sector regulator and to a surety in a contract of guarantee to a corporate debtor.,,,,,

31. The order of moratorium shall have effect from the date of this order till 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 may be.,,,,,

32. The Law Research Associate of this Tribunal has checked the credentials of Mr. Neeraj Bhatia and there is nothing adverse against him. The",,,,,

following directions are issued in respect of the appointment of the Interim Resolution Professional:â?"",,,,,

i.) Appoint Shri Neeraj Bhatia, P-27, 1st Floor, Malviya Nagar, New Delhi-110017, having Registration No. IBBI/IPA-001/IP-P00824/2017-18/11400",,,,,

and email address nbtrace1@yahoo.com, Mobile No. 9810317585, as an Interim Resolution Professional;"",,,,,

ii.) The term of appointment of Shri Neeraj Bhatia, shall be in accordance with the provisions of Section 16(5) of the Code;,,,,

iii.) In terms of Section 17 of the Code, from the date of this appointment, the powers of the Board of Directors shall stand suspended and the",,,,,

management of the affairs shall vest with the Interim Resolution Professional and the officers and the managers of the Corporate Debtor shall report,,,,

to the Interim Resolution Professional, who shall be enjoined to exercise all the powers as are vested with Interim Resolution Professional and strictly",,,,,

perform all the duties as are enjoined on the Interim Resolution Professional under Section 18 and other relevant provisions of the Code, including",,,,,

taking control and custody of the assets over which the Corporate Debtor has ownership rights recorded in the balance sheet of the Corporate Debtor,,,,

etc. as provided in Section 18(1)(f) of the Code. The Interim Resolution Professional is directed to prepare a complete list of inventory of assets of the,,,,

Corporate Debtor;,,,,

iv.) The Interim Resolution Professional shall strictly act in accordance with the Code, all the rules framed thereunder by the Board or the Central",,,,,

Government and in accordance with the Code of Conduct governing his profession and as an Insolvency Professional with high standards of ethics,,,,

and moral;,,,,

v.) The Interim Resolution Professional shall cause a public announcement within three days as contemplated under Regulation 6 of the Insolvency,,,,

and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 of the initiation of the Corporate Insolvency",,,,,

Resolution Process in terms of Section 13(1)(b) of the Code read with Section 15 calling for the submission of claims against Corporate Debtor;,,,,

vi.) It is hereby directed that the Corporate Debtor, its Directors, personnel and the persons associated with the management shall extend all",,,,,

cooperation to the Interim Resolution Professional in managing the affairs of the Corporate Debtor as a going concern and extend all cooperation in,,,,

accessing books and records as well as assets of the Corporate Debtor;,,,,

vii.) The Interim Resolution Professional shall after collation of all the claims received against the Corporate Debtor and the determination of the,,,,

financial position of the Corporate Debtor constitute a Committee of Creditors and shall file a report, certifying constitution of the Committee to this",,,,,

Tribunal on or before the expiry of thirty days from the date of his appointment, and shall convene first meeting of the Committee within seven days of",,,,,

filing the report of constitution of the Committee; and,,,,

viii.) The Interim Resolution Professional is directed to send regular progress report to this Tribunal every fortnight.,,,,

33. A copy of this order be communicated to both the parties. The learned counsel for the petitioner shall deliver copy of this order to the Interim,,,,

Resolution Professional forthwith. The Registry is also directed to send copy of this order to the Interim Resolution Professional at his email address,,,,

forthwith.,,,,