

(2019) 08 NCLT CK 0057

In the National Company Law Appellate Tribunal

Case No : Company Petition No. (IB)-1644(PB) Of 2018

Oriental Bank Of Commerce

APPELLANT

Vs

KMG A To Z Systems Private Limited

RESPONDENT

Date of Decision : 06-08-2019

Acts Referred:

Insolvency And Bankruptcy (Application To Adjudicating Authority) Rules, 2016 — Rule 4, 9(1)

Insolvency And Bankruptcy Code, 2016 — Section 4, 5(7), 5(8), 7, 7(1), 7(3)(a), 7(3)(b), 7(5)(a), 13(2), 14, 14(1)(a), 14(1)(b), 14(1)(c), 14(1)(d), 14(3)(b), 15, 17, 18, 19, 20, 21, 60(1), 238

Securitisation And Reconstruction Of Financial Assets And Enforcement Of Security Interest Act, 2002 — Section 13(2)

Insolvency And Bankruptcy Board Of India (Insolvency Resolution Process For Corporate Person) Regulations, 2016 — Regulation 6, 6(1)

Citation : (2019) 08 NCLT CK 0057

Hon'ble Judges : M.M. Kumar, CJ; Santanu Kumar Mohapatra, Member (Technical)

Bench : Division Bench

Advocate : Balvinder Ralhan, Rajesh Sharda

Judgement

Santanu Kumar Mohapatra, Member (T)

1. Oriental Bank of Commerce has filed the instant application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with a prayer to trigger Corporate Insolvency Resolution Process in respect of respondent Company M/s. KMG A to Z Systems Private Limited, referred to as the corporate debtor.

2. The Respondent Company M/s. KMG A to Z Systems Private Limited. (CIN No. U74899 DL1999 PTC 102816) against whom initiation of Corporate Insolvency Resolution Process has been prayed for, was incorporated on 15.12.1999 having its registered office situated at G-65 A, LGF, Kalkaji, New Delhi -110019. Since

the registered office of the respondent corporate debtor is in New Delhi, this Tribunal having territorial jurisdiction over the NCT of Delhi is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor under subsection (1) of Section 60 of the Code.

3. It is appropriate to mention that the applicant Oriental Bank of Commerce is a body corporate constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act No. 40 of 1980 having its head office at E Block, Harsha Bhawan, Cannaught Place, New Delhi - 110001.

4. Shri Durgesh Kumar, Chief Manager and authorized representative of the applicant bank, has preferred the present application on behalf of the applicant for initiation of corporate insolvency resolution process against the respondent corporate debtor in terms of the provisions of the Code.

5. The precise case of the applicant is that it sanctioned various loan facilities from time to time to M/s. KMG A to Z Systems Private Limited. As per Part IV of the application lastly on 18.06.2015 the following facilities were renewed/granted:

- i. Cash Credit (Hypothecation) of Rs. 29 crore;
- ii. Bank Guarantee Limit of Rs. 52.40 Crores;
- iii. Working Capital Demand Loan Rs. 56.49 Crores.

6. In order to secure the financial facilities, the respondent corporate debtor signed and executed various security and loaning documents from time to time in favour of applicant financial creditors. The corporate debtor also hypothecated the current assets and fixed assets of the respondent company. Besides it is claimed that the respondent company created equitable mortgage of factory land & building situated at C-48 & 49, Sector 81, Noida UP including factory building constructed thereon in favor of the applicant bank.

7. It is submitted that applicant financial creditor created charge for a sum of Rs. 142.89 Crores which have been duly registered in the office of Registrar of companies. A copy of the certificate of Registration of charge dated 17.12.2015 has been placed on record which shows that charge was created in favor of applicant Oriental Bank of Commerce to secure the loan amount of Rs. 142.89 crores given to the respondent company KMG A to Z Systems Private Limited.

8. Applicant financial creditor has also filed duly signed and sealed the bank account statements pertaining to loan accounts of the corporate debtor as setout below:

- i. A/c No. Cash Credit 07074010000330
- ii. A/c No. Term Loan 09317025001233

9. It is alleged that the borrower M/s. KMG A to Z Systems Private Limited

defaulted and failed to make repayment as per the loan agreements. On account of continuous defaults, the accounts of M/s. KMG A to Z Systems Private Limited was declared as "non-performing assets" (NPA) on 31.12.2015.

10. The corporate debtor defaulted to pay the outstanding debts despite legal notice dated 27.01.2016 served upon the corporate debtor. Subsequently, applicant stated to have issued notice dated 19.08.2016 under Section 13(2) of SARFAESI Act, 2002, however the respondent failed to repay the outstanding debt.

11. In part IV of the Form I applicant bank has claimed that the total amount in default as on 31.10.2018 is as follows:

Principal O/s Rs. 127,97,53,627/- Recorded Interest Rs. 62,96,97,348/- Total Outstanding Rs. 190,94,50,975/-

12. Applicant financial creditor has claimed that the requisites of Section 7 of the Code stands satisfied in the present case, inasmuch as huge default has occurred, and the amount defaulted is much more than the statutory requirement of Rs. 1.00 Lakh (in this case above Rs.190 Crores). On the ground that huge loan amounts are outstanding, it is prayed for initiation of corporate insolvency resolution process against the respondent company by admitting the present application.

13. The respondent corporate debtor has filed its reply on 18.02.2019. Rejoinder to the reply was filed by applicant on 17.03.2019.

14. We have heard the learned counsels for the parties and have perused the case records.

15. It is pertinent to mention here that the scheme of the Code provides for triggering the insolvency resolution process by three categories of persons namely,

- a) Financial creditor
- b) Operational creditor, and
- c) Corporate debtor itself.

16. The procedure in relation to the Initiation of Corporate Insolvency Resolution Process by the "Financial Creditor" is delineated under Section 7 of the Code, wherein only "Financial Creditor"/"Financial Creditors" can file an application. As per Section 7(1) of the Code, an application could be maintained by a Financial Creditor either by itself or jointly with other Financial Creditors.

17. The expressions "Financial Creditor" and "Financial debt" have been defined in Section 5(7) and 5(8) of the Code and precisely "Financial debt" is a debt along with interest, if any, which is disbursed against the consideration for time value of money.

18. In the present case applicant Oriental Bank of Commerce had sanctioned and disbursed the loan facilities which are recoverable with applicable interest by entering in to loan agreements with the respondent borrower. The corporate debtor had undertaken the liability to repay the loan along with the agreed interest. The loan was clearly disbursed against the consideration for time value of money with a clear commercial effect of borrowing. Moreover, the debt claimed in the present application includes both the component of outstanding principal and interest.

19. In that view of the matter not only the present claim comes within the purview of 'Financial Debt' but also the applicant bank can clearly be termed as 'Financial Creditor' of the respondent corporate debtor so as to prefer the present application under Section 7 of the Code.

20. The application filed by the applicant financial creditor has to be admitted under sub-section 5 (a) of Section 7 of the code, on satisfaction that:

I. Default has occurred.

II. Application is complete, and

III. No disciplinary proceeding against the proposed IRP is pending.

21. An application under Section 7 of the Code is acceptable so long as the debt is proved to be due and there has been occurrence of existence of default. What is material is that the default is at least 1 lakh. In view of Section 4 of the Code, the moment default is of Rupees one lakh or more, the application to trigger Corporate Insolvency Resolution Process under the Code is maintainable.

22. In the present case the applicant financial creditor has filed copies of relevant sanction letters, loan agreements, Hypothecation deeds and guarantee deeds created to secure the loan facility availed by the respondent corporate debtor. Applicant has also relied upon relevant extracts of the Minutes of the Board Meetings of the respondent company as a proof of debt and security. Besides applicant has placed on record mortgage documents and Charge Certificates registered with RoC giving details of security charges held by applicant Bank. In addition, copies of ledger accounts duly signed and sealed have been placed on record. Moreover, a commercial credit information report by CIBIL has been relied upon in support of the financial debt.

23. It is thus seen that the applicant 'financial creditor' has placed on record voluminous and overwhelming evidence in support of the claim as well as to prove the default on the part of the respondent corporate debtor.

24. In connection with the 2nd requirement of sub-section 5 (a) of Section 7 of the code, it is seen that the present application is complete and has been filed by the petitioner financial creditor in Form-1 in terms of Rule 4 of Insolvency and Bankruptcy (application to Adjudicating Authority) Rules, 2016 accompanied with the required information, documents and records as prescribed under the Rules.

25. The applicant bank inert-alia has annexed to the application detail particulars of 'financial debt' including documents, records and evidence of default as required under subsection 3 (a) of Section 7 of the Code. It is reiterated that the Form-1 filed in the present case under Section 7 of the Code read with Rule 4 of the Rules, shows that the Form is complete in all respect and there is no infirmity in the same.

26. Sub-section (3) (b) of Section 7 of the Code further mandates the financial creditor to furnish the name of an Interim Resolution Professional. In compliance thereof the applicant has proposed the name of Mr. Sandeep Bhatt, for appointment as Interim Resolution Professional having registration number IBBI/ IPA-003/IP-P00038/2017-18/10298 resident of 83 B, Pocket 4, Mayur Vihar, Phase - 1, New Delhi - 110091 with email - id skbmiCA@gmail.com. Sh. Sandeep Bhatt has agreed to accept the appointment as the interim resolution professional and has signed a communication dated 22.10.2018 in Form 2 in terms of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. There is a declaration made by him that no disciplinary proceedings are pending against him in Insolvency and Bankruptcy Board of India or elsewhere. In addition, further necessary disclosures have been made by Mr. Sandeep Bhatt as per the requirement of the IBBI Regulations. Accordingly, it is seen that the requirement of Section 7(3) (b) of the Code has also been satisfied.

27. It is thus seen that the requirement of sub-section 5 (a) of Section 7 of the code stands satisfied as default has occurred, the present application filed under Section 7 is complete, and that as no disciplinary proceeding against the proposed IRP is pending.

28. However, before parting various objections raised by the respondent corporate debtor are discussed below.

29. The main objection of the respondent is that it had filed a civil suit for declaration and injunction against the applicant bank and Credit Information Bureau (India) Limited being civil suit no. CS/SCJ 290/2017 before the court of learned Civil Judge, Patiala House Court, New Delhi which is still sub-judice. It is further contended that Ld. Court has passed a restraint order on 22.05.2018 restraining the petitioner bank from declaring the respondent as willful defaulter.

30. In this connection petitioner bank has submitted in its rejoinder that the aforesaid restraint order does not bar the financial creditor for invoking the provisions of IBC.

31. In the present proceeding under the Code it is not to be seen whether the default is willful or not. An application under Section 7 of the Code is acceptable so long as the debt is proved to be due and there has been occurrence of existence of default for at least Rs. 1 lakh. In view of Section 4 of the Code, the moment default is of Rupees one lakh or more, the application to trigger Corporate Insolvency Resolution Process under the Code is maintainable.

32. In this regard it is well settled that pendency of proceedings cannot be an impediment or bar to initiate the Corporate Insolvency Process against the corporate debtor under the provisions of Section 7 of the Code. Simply pendency of proceedings cannot be a ground to deny admission of an application under Section 7 of the Code, once the application is complete and there has been commission of default.

33. Hon'ble NCLAT in the matter of M/s. Ksheeraabd Constructions Pvt. Ltd. V. M/s. Vijay Nirman Company Pvt. Ltd. in Company Appeal (AT) (Insolvency) No. 167 of 2017 has observed that:

"The "I & B Code" being a complete code will prevail over other Acts.-----
No person can take advantage of pendency of a case to stall "Corporate Insolvency Resolution Process" under the I & B Code".

34. Similarly, in the case of M/s. Innoventive Industries Ltd. V. ICICI Bank and Ors. reported in AIR 2017 SC 4084, Hon'ble Supreme Court has also held at para 56 that:

"The non-obstante clause, in the widest terms possible, is contained in Section 238 of the Code, so that any right of the corporate debtor under any other law cannot come in the way of the Code".

35. In view of the above discussion, the objection in this regard will not sustain as initiation and pendency of proceedings in different forums is no bar for initiation of Corporate Insolvency Resolution Process under Section 7 of the Code in view of the overriding effect given to the provisions of Section 238 of the Code.

36. Respondent has further alleged that the applicant bank being in a dominant position got certain sets of unfilled papers, undated printed proformas, blank stamp papers and forms etc.; signed from the signatory of the respondent company. Admittedly, respondent had availed the loan facility and suo moto had executed security and other loan documents since the year 2003. Respondent cannot take such ground at this belated stage that to after availing the fruit of the loan facility. There is nothing on record to show as to why the express terms of commercial loan agreements duly executed, are not binding on the parties.

37. Respondent has further disputed the financial debt with the allegation that the claim of the applicant bank is highly inflated. Section 7 application filed under the Code cannot be rejected on the ground that the claim has been disputed. It is no matter that the debt is disputed so long as the debt is due and payable. Adjudicating Authority is only to ascertain the existence of a default. The Adjudicating Authority is not required to decide as to what is the actual amount of claim and other details. Adjudicating Authority do not decide a money claim or suit, which can only be decided by the court of competent jurisdiction.

38. The respondent has also raised objection that the applicant bank has misused its position and for the inaction of the applicant bank the company was pushed to financial de-stability. The respondent has blamed the financial

creditors in causing financial loss to the company. The reply largely deals with the fact that the company faced many challenges in its operation. It is further alleged that there are disputed and complicated questions of facts involved in the present matter which cannot be decided summarily in present proceedings.

39. These issues are irrelevant for the disposal of the present proceeding filed under the Code. Initiation of CIRP under Section 7 of the Code is not an adversary litigation. It is neither a recovery proceeding nor can be treated to be a suit or case pending for decision on merit.

40. Hon'ble Supreme Court in the case of Mobilox Innovations Private Limited V. Kirusa Software Private Limited reported in AIR 2017 SC 4532 at Para 19 has observed that:

"Once the adjudicating authority/Tribunal is satisfied as to the existence of the default and has ensured that the application is complete and no disciplinary proceedings are pending against the proposed resolution professional, it shall admit the application. The adjudicating authority/Tribunal is not required to look into any other criteria for admission of the application." (Emphasis given)

41. Adjudicating Authority cannot decide issue of claim of loss, claim of collusion including disputed issues, which can be decided by the court of competent jurisdiction. Thus, any facts unrelated or beyond the requirement of the Code are not required to be considered and such narrations cannot be a ground to reject the application filed under Section 7 of the code.

42. The corporate debtor is entitled to point out to the Adjudicating Authority that a default has not occurred; in the sense that a debt, which may also include a disputed claim is not due i.e. it is not payable in law or in fact. Respondent Corporate Debtor has miserably failed to raise any good defense against the petition and also has failed to place its updated financial statement to show that no financial debt is due.

43. In the aforesaid background it is seen that the applicant bank clearly comes within the definition of Financial Creditor. Respondent has neither denied the availment of credit facilities granted by the financial creditor from time to time, nor denied the execution of loaning documents in favour of the applicant bank. The material placed on record confirms that the respondent corporate debtor committed default in repayment of the financial debt. On a bare perusal of Form - I filed under Section 7 of the Code read with Rule 4 of the Rules shows that the form is complete and there is no infirmity in the same. It is also seen that there is no disciplinary proceeding pending against the proposed IRP. We are satisfied that the present application is complete in all respect and the applicant financial creditor is entitled to claim its outstanding financial debt from the corporate debtor and that there has been default in payment of the financial debt.

44. As a sequel to the above discussion and in terms of Section 7(5) (a) of the Code, the present application is admitted.

45. Mr. Sandeep Bhatt having registration number IBBI/IPA-003/IP-P00038/2017-18/10298 resident of 83 B, Pocket 4, Mayur Vihar, Phase - 1, New Delhi - 110091 with email id skbmiCA@gmail.com. is appointed as an Interim Resolution Professional.

46. We direct the applicant Financial Creditor to deposit a sum of Rs. 1 Lac with the Interim Resolution Professional namely Mr. Mohinder Singh to meet out the expenses to perform the functions assigned to him in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within three days from the date of receipt of this order by the Financial Creditor. The said amount however be subject to adjustment towards Resolution Process cost as per rules and shall be paid back to the Financial Creditor.

47. In pursuance of Section 13(2) of the Code, we direct that public announcement shall be made by the Interim Resolution Professional immediately (3 days as prescribed by Explanation to Regulation 6(1) of the IBBI Regulations, 2016) with regard to admission of this application under Section 7 of the Insolvency & Bankruptcy Code, 2016.

48. We also declare moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14(1) (a), (b), (c) & (d) of the Code. 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 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."

49. 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, are not to be terminated or suspended or interrupted during the moratorium period. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which has come into force w.e.f. 06.06.2018, the provisions of moratorium shall not apply to the surety in a contract of guarantee to the corporate debtor in terms of Section 14(3) (b) of the Code.

50. The Interim Resolution Professional shall perform all his functions contemplated, inter-alia, by Sections 15, 17, 18, 19, 20 & 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, Rules and Regulations. 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 day to day affairs of the 'Corporate Debtor'. In case there is any violation committed by the ex-management or any tainted/illegal transaction by ex-directors or anyone else, 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, Rules and Regulations.

51. The office is directed to communicate a copy of the order to the Financial Creditor, the Corporate Debtor, the Interim Resolution Professional and the Registrar of Companies, NCT of Delhi & Haryana at the earliest possible but not later than seven days from today. The Registrar of Companies shall update its website by updating the status of 'Corporate Debtor' and specific mention regarding admission of this petition must be notified to the public at large.