(2022) 06 NCLT CK 0018

In the National Company Law Tribunal

Case No : IVN.P.(IBC)/6/2021 In C.P. (IB) No. 118/KB/2021

Punjab National Bank Limited APPELLANT

Vs

Brahm (Alloys) Limited RESPONDENT

Date of Decision : 08-06-2022

Acts Referred:

Insolvency And Bankruptcy Code, 2016 — Section 5(7), 7, 60(5)
State Financial Corporations Act, 1951 — Section 29, 30?National Company Law Tribunal Rules, 2016 — Rule 11

Citation : (2022) 06 NCLT CK 0018

Hon'ble Judges : Rohit Kapoor, Member (J);Harish Chander Suri, Member (T)

Bench : Division Bench

Advocate : Ranajit Chowdhury, Joy Saha, Snehashis Sen, Abhijit Sarkar, Abhik Chitta Kundu

Final Decision : Dismissed

Judgement

Harish Chander Suri, Member (Technical)

1. This Court convened through video conferencing.

2. This is an application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 and Rule 11 of the NCLT Rules, has been filed by West Bengal Financial Corporation, a body corporate formed and constituted under State Financial Corporations Act, 1951 having its registered office at DD-22, Sector-I, Salt Lake City, Kolkata-700064 against Brahm (Alloys) Limited incorporated under the provisions of the Companies Act, 1956 having its registered office at 6/ B and 25B, Camac Street, Sixth Floor, Kolkata-700016.

3. The applicant has submitted that the Corporate Debtor is engaged in the business of manufacturing M.S. Ingot, TMT Bars and Pig Iron. It is submitted that for the purpose of manufacturing M.S. Ingots, TMT Bars and Pig Irons, the Corporate Debtor requested the applicant to provide credit facilities and ultimately, the applicant provided credit facilities to the extent of Rs.54.62 crores

to the Corporate Debtor. The said sum was made over as a Term Loan and a Loan Agreements were entered into between the parties on March 28, 2014 and March 3, 2005. These loan agreements were followed by execution of various other documents (Annexure –A).

4. It is further submitted that after execution of the Loan Agreements, there was no default on the part of the Corporate Debtor in complying with the repayment obligations, and a sum of Rs.39.40 crores was paid to the applicant towards outstanding liabilities particulars whereof are evident from a Schedule (Annexure-B).

5. It is submitted that the Financial Creditor has a second charge over the fixed assets and properties of the Corporate Debtor as a security for the loans given by the Financial Creditor and that the fixed assets and properties of the Corporate Debtor are subservient to the charge which has been created in respect of the same fixed assets and properties in favour of the applicant herein. It is submitted that this is evident from the Triparte Agreement which was entered into between the applicant, Corporate Debtor and the Financial Creditor (Annexure-C).

6. The applicant further submits that on and from March, 2017, the Corporate Debtor failed to comply with the repayment obligations, and on being enquired, the Corporate Debtor informed that non-compliance of repayment obligations has occurred for reasons beyond the control of the Corporate Debtor and that it was on account of the global recession in the Steel Industry, due to which, the Corporate Debtor has been facing adverse consequence and the business operation and growth of the Corporate Debtor has been affected. It is submitted that between April, 2004, and June, 2021,the Corporate Debtor made payment of the principal/interest component of the credit facilities made over by the applicant. It is further submitted that the Corporate Debtor filed three writ petitions, Viz. 1. W.P.No.3101(W) of 2018- Brahm (Alloys) Limited & Anr. Vs. West Bengal Financial Corporation & Ors. 2. W.P.NO.5762 (W) of 2020, Brahm (Alloys) Limited & Anr. Vs. West Bengal Financial Corporation & Ors. 3. W.P.A. 9084 of 2020, Brahm (Alloys) Limited & Anr. Vs. West Bengal Financial Corporation & Ors.(Annexure-E) to the petition.

7. It is further submitted that the Corporate Debtor failed to comply with the repayment obligations, and consequently, those credit facilities were recalled pursuant to notice dated 27th December, 2017 issued under section 30 of the State Financial Corporations Act, 1951 (Annexure F) to the petition, followed by another notice dated January, 30,2018 issued under Section 29 of the State Financial Corporations Act, 1951 (Annexure-G). In terms of these two notice, the Corporate Debtor became liable to a sum of Rs.16,85,18,956.72 to the applicant and it was indicated by the applicant that to the Corporate Debtor that possession of manufacturing plant of the Corporate Debtor would be taken over on 12th February, 2018. It is submitted that on receipt of the said notice under section 29 of the of the Act,1951, the Corporate Debtor filed a Writ Petition being W.P.No. 3101(W) of 2018, inter alia praying for the following reliefs:-

“ a) A Writ of or in the nature of Mandamus do issue commanding the respondent authorities to forthwith rescind, recall, cancel and /or withdraw the notice dated 27th December, 2017, 24th January, 2018 and 30th January, 2018 being Annexure- “ P-10”, “ P-11” and “P-14” respectively hereof;

b) A writ of or in the nature of mandamus do issue commanding the respondent authorities not to give any effect or further effect or not to act in terms of or in furtherance to the notice dated 27th December, 2017, 24th January, 2018 and 30th January, 2018 being Annexure “ P-10”, “ P-11” and “P-14” respectively hereof in any manner whatsoever;

c) A writ of or in the nature of mandamus do issue commanding the respondent authorities to forthwith consider the petitioner’s proposal for restructuring of its Term Loan Accounts being Annexure” P-15” hereof after giving an opportunity of hearing to the petitioners.

d) A writ of or in the nature of mandamus do issue commanding the respondent authorities not to disturb and /or interfere with and /or threaten to interfere with the petitioners possession and/or occupation of the said factory premises which has been more fully described in paragraph “3” hereof, in any manner whatsoever;

e) Rule NISI in terms of prayers above;

f) Direction upon the respondent authorities to forthwith rescind, recall, cancel and/or withdraw the notice dated 27th December, 2017, 24th January, 2018 and 30th January, 2018 being Annexure “ P-10”, “ P-11” and “P-14” respectively hereof;

g) Direction upon the respondent authorities not to give any effect or further effect or to act in terms of or in furtherance to the notices dated 27th December, 2017, 24th January, 2018 and 30th January, 2018 being Annexure “ P-10”, “ P-11” and “P-14” respectively hereof, in any manner whatsoever;

h) Direction upon the respondent authorities to consider the petitioner’s proposal for restructuring of its Term Loan Accounts being Annexure”P-15” hereof after giving an opportunity of hearing to the petitioners;

i) Direction upon the respondent authorities not to disturb and/or interfere with and/or threaten to interfere with the petitioners possession and/or occupation of the said factory premises which has been more fully described in paragraph “3” hereof, in any manner whatsoever;

j) Injunction restraining the respondent authorities, their men, servants, agents and/or assigns from interfering with and/or threatening to interfere with the petitioners possession and/or occupation of the said factory premises which is more fully described in paragraph “3” hereof in any manner whatsoever;

k) Injunction restraining the respondent authorities, their men, servants, agents and/or assigns from giving any effect or further effect or acting in terms of or in furtherance to the notices dated 27th December, 2017, 24th January, 2018 and 30th January, 2018 being Annexure " P-10","P-11" and "P-14" respectively hereof, in any manner;

l) Ad-interim orders in terms of prayers above;

m) Such further and/or other order or orders be passed, direction or directions be given as Your Lordship may deem fit and proper".

8. It is submitted that the said writ petition was dismissed by the Hon?ble High Court at Calcutta by an order dated 12th February, 2018, (Annexure H to the petition), against which an appeal was preferred by the Corporate Debtor being M.A.T. No.200 of 2018 and an application seeking interim relief being C.A.N. No. 1417 of 2018, both the appeal and the application were disposed of by an order dated February 13,2018, (Annexure-I) and in terms of the said order, the Corporate Debtor was directed to make payment of 50% of the dues of the applicant by the end of February, 2018 and the remaining 50% dues of the applicant were directed to be paid by the end of the March, 2018. It was further directed by the Hon?ble High Court that applicant may take an appropriate steps in case there was default on the part of the Corporate Debtor.

9. Pursuant thereto, the Corporate Debtor made a payment of Rs.4.07 crores between March, 2018 and March, 2019 (Annexure-J).

10. It is further submitted by the applicant that on February 7,2018, however requests were made by the Corporate Debtor for restructuring the loans and advances provided by the applicant but the requests were rejected by the applicant in view of the fact that no concrete proposal for payment of dues was made by the Corporate Debtor (Annexure-K) and finally on March 12, 2020, sale notice was published by the applicant for sale of the assets and the plant and machinery of the Corporate Debtor (Annexure-L).

11. It is submitted that in order to circumvent the sale to be conducted by the applicant, a One Time Settlement (OTS) offer was made by the Corporate Debtor vide letter dated March 16,2020 (Annexure-M) and since the offer of onetime settlement was not genuine, a letter dated 21st March, 2020, was issued by Karnataka Bank Limited, (Annexure-N).

12. It is submitted that the Corporate Debtor again filed a Writ Petition being W.P.No. 5762(W) of 2020, inter alia, praying for rescinding, recalling, and withdrawing the e-auction, Sale Advertisements dated 12th March, 2020 and 25th June, 2020 issued by the Managing Director, West Bengal Financial Corporation published in the ?Economic Times? dated 12th March, 2020 and 25th June, 2020 and also in the ?Bartaman? Newspaper dated 12.03.2020 or in other Newspaper for sale of the properties in question on July 7, 2020 being annexed as (Annexure- 17 and 19 respectively)

13. It is submitted that the Hon?ble High Court vide orders dated July 2,2020 , August 6,2020 and October 21,2020 passed orders which are annexed as

(Annexure-O), whereby since none appeared on behalf of the applicant, this matter was directed to be taken out of the list.

14. It is submitted by the applicant that despite assuring that payments would be made in respect of the amounts due and payable, no payment was made by the Corporate Debtor on and from April 1,2021 and sum of Rs.20,65,26,998/- is due and payable by the Corporate Debtor to the applicant, a schedule whereof is annexed as (Annexure-R).

15. It is submitted that the Financial Creditor and other Creditors were watching the proceedings before the Hon?ble High Court at Calcutta. The Financial Creditor has also taken steps to recover the amounts due.

16. It is submitted that the applicant was under the impression that in view of the orders dated February 13, 2018 passed by the Hon?ble High Court at Calcutta, the Corporate Debtor will make payment of Rs.6,50,00,000/- only by March, 2018. However, the deadlines specified in the orders of the Hon?ble High Court were disregarded. Instead of making payment in terms of the order dated February 13, 2018, frivolous proceedings were initiated by the Corporate Debtor against the applicant.

17. The applicant has further submitted that the Corporate Debtor is acting in collusion with Financial Creditor and is an attempt to take benefit of the CIRP. It is submitted that the Financial Creditor will also benefit in view of the fact that despite the applicant holding a superior charge, the Financial Creditor would receive at par with the applicant, which would cause serious prejudice to the applicant and the applicant would have to take a haircut.

18. It is submitted that the manner in which the recovery by the applicant is being thwarted by initiating CIRP, the assets would not be sold immediately and the Financial Creditor would benefit because it would claim on equal basis as the applicant.

19. It is submitted that initiation of the present proceedings is fraudulent and with malicious intent and that this purpose is not resolution of the Insolvency. It is submitted that the proceedings have been initiated by the Financial Creditor for the purpose of preventing the applicant from proceeding under the State Financial Corporations Act, 1951.

20. It is submitted that in view of the fact that a superior charge in favour of the applicant has been created by the Corporate Debtor, the present proceeding has been initiated by the Financial Creditor in connivance with the Corporate Debtor, directly or indirectly or through related parties to take benefit of the Corporate Resolution Process for collateral purposes.

21. The applicant has thus prayed that present proceedings in C.P.(IB) No. 118 / KB/2021 be stayed and finally dismissed.

22. After hearing Ld. Counsel for the applicant, it is surprising to note that the

applicant has challenged right of the Financial Creditor to file the present C.P.(IB) No. 118 /KB/2021 for the reason that the applicant has the first charge over the properties and assets of the Corporate Debtor. It may be mentioned that section 5(7) defines "Financial Creditor, to mean that any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to". Financial Creditor Punjab National Bank has filed the present CP, being one of the Financial Creditors of the Corporate Debtor in its own right, available to it under the Insolvency and Bankruptcy Code, 2016. Similarly, the applicant West Bengal Financial Corporation, the applicant herein may also be one of the Financial Creditors independently. It may also file its own proceedings before any authorities including the Hon?ble High Court where ever it has a right to sue the Corporate Debtor but to say that the Financial Creditor does not have any right to proceed against the Corporate Debtor under the provisions of the I & B Code, 2016, is a plea in the present application which has to be rejected in limine. The IBC Code provides equal rights to all the Financial Creditors to proceed against Corporate Debtor and if any of the application is admitted, the others can always submit their claims before the IRP/RP appointed in the matter to claim their debts as per the law. Once a Corporate Debtor is in default, and put under CIRP, the rights of the Financial Creditors would be ascertained on the basis of their status whether they are secured creditors or unsecured creditors. If any one of the them claims to be a secured creditor holding security in the shape of assets of the Corporate Debtor, he would have the right either to dispose of the security and claim its debts, or to relinquish its security and claim its debts along with other Financial Creditors.

23. In the present case only because the applicant had fought certain litigation with the Corporate Debtor, in which certain orders had been passed by the Hon?ble High Court of Calcutta, pursuant to which, some part payment is stated to have been received by the applicant, and there is some balance amount to be received by the applicant, this Adjudicating Authority cannot entertain a plea from the applicant that the petition under section 7of the Code filed by the Financial Creditor against the Corporate Debtor is collusive one. The filing of the application under section 7 of the Code has not in any way restrained or restricted the right of the applicant in filing any similar petition under section 7 of the Code before this Adjudicating Authority seeking CIRP of the Corporate Debtor on the basis of the financial debt due to the applicant from the Corporate Debtor.

24. With these observations and directions, the present IVN.P.(IBC)/6/2021 is dismissed being devoid of any substance or merits. The applicant may avail all its remedies either before this Adjudicating Authority or any other forum if and when it chooses to do so.

25. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

