
(2020) 05 NCLT CK 0006

In the National Company Law Appellate Tribunal

Case No : (IB) No. 2039 (ND) Of 2019

Suraksha Asset Reconstruction Limited

APPELLANT

Vs

Noida Medicare Centre Limited

RESPONDENT

Date of Decision : 27-05-2020

Acts Referred:

Insolvency And Bankruptcy (Application To Adjudicating Authority) Rules, 2016 — Rule 4, 4(3)

Insolvency And Bankruptcy Code, 2016 — Section 4, 5(7), 5(8), 7, 7(1), 7(2), 7(5), 7(5)(a), 7(7), 8, 8(1), 8(2), 14, 15, 16, 17, 18, 31(1), 33, 60(5)

Citation : (2020) 05 NCLT CK 0006

Hon'ble Judges : Abni Ranjan Kumar Sinha, J;Kapal Kumar Vohra, Member (Technical)

Bench : Division Bench

Advocate : Abhinav, Sonali Khanna, Anshuman, Chitranshul A. Sinha, Prashant Kataria, Rohit Mehra

Final Decision : Dismissed

Judgement

Abni Ranjan Kumar Sinha, J

1. The present application is filed on behalf of the Applicant by Suraksha Asset Reconstruction Ltd. ("Financial Creditor/Applicant"), in the capacity of a Financial Creditor under Section 7 of the IBC, 2016, therein to initiate the CIRP against M/s. Noida Medicare Centre Limited ("Corporate Debtor").

2. Facts of the case in brief is that subsequent to obtaining credit facilities from Kotak Mahindra Bank (the original lender) the Corporate Debtor failed to keep its account regular and thus, committed various defaults in contravention of the express conditions contained in the loan documents. Consequently, the Original Lender declared the account of the Corporate Debtor as Non-Performing Asset (NPA) due to continuing defaults. Thereafter, by way of an assignment agreement dated 29.09.2017, the original lender (Kotak Mahindra Bank) assigned the debt to the Financial Creditor herein, along with the underlying

securities.

3. Despite the said restructuring, and repeated request, reminders and demands by the Applicant, the Corporate Debtor failed and neglected to repay the amount due under the aforesaid loaning facility and/or adhere to the terms and conditions of Restructuring Letter. Therefore, the same stood revoked on February 12, 2019. As a result, a principal amount of Rs. 9,02,67,946/- along with the interest component @ 20% p.a. is due and payable at the aforementioned principal amount from April 23, 2019 till the realization, stands due and outstanding at the hands of the Corporate Debtor.

4. The Corporate Debtor has appeared and filed the reply dated 06.11.2019. The facts of the reply, in short, is that the application filed under Section 7 is incomplete and the applicant has failed to provide the details of the amount claimed to be in default and the date on which the default is occurred. Further, the Financial Creditor has completely concealed the content of the letter dated 29.09.2017 by way of which credit facilities were given.

5. By way of the letter dated 29.09.2017, the aforesaid loan accounts stood restructured in a manner thereby making the Corporate Debtor as the sole borrower for a total sum of Rs. 13,50,00,000/- also stood sanctioned in favour of the Corporate Debtor by the Financial Creditor and a separate Assignment Agreement dated 29.09.2017 stood executed between the parties recording the same. The said understanding also stood recorded in the letter dated 03.10.2017 which was executed by the Financial Creditor in favour of the Corporate Debtor. It is most pertinent to bring to light that since the transaction between the parties herein was in the form of "Restructuring" and sanctioning of a fresh loan facility, the Corporate Debtor also charged a sum of Rs. 33,50,000 as processing fee at 2 % of Rs. 13,50,00,000/- (the amount restructured) and 2% of Rs. 3,25,00,000/- (only being the top up loan). The quantification of the amount as charged being Rs. 33,50,000/- stands described below: -

Loan Amount (in Rs.)

Processing fees at 2%

13.5 Crores

27 Lakhs

3.25 Crores

6.50 Lakhs

Total

33.50 Lakhs

6. The aforesaid processing fee stood duly paid by the Corporate Debtor to the Financial Creditor, hence, all terms and conditions for the restructuring loan were complied with by the Corporate Debtor. A copy of the letter dated 03.10.2017

and a copy of the Loan Agreement dated 29.09.2017 are annexed as Annexure R-2 (Colly.) and copy of the email dated 05.09.2017 and copy of the bank statement substantiating the payment of processing fee are annexed as Annexure R-3(Colly).

7. In terms of the Restructuring of the loans undertaken by the parties herein, the terms and conditions of the repayment by the Corporate Debtor were as follows:

a) Repayment of the loan amount of Rs. 13,50,00,000/- being taken over, to be done by 30.09.2025 @ 20%.

b) Repayment of top up loan amount of Rs. 3.25 Crores to be done by 30.09.2025 at 20%.

8. Further, Corporate Debtor in terms of the restructuring, had paid a sum of Rs. 1,17,48,203/- to the Corporate Debtor. However, thereafter, certain disputes arose between the parties regarding the terms and conditions governing the transactions. The Corporate Debtor was once again constrained to request the Financial Creditor vide its email dated 07.08.2019, 12.08.2019 to provide for the statement of the restructured loan account. The Financial Creditor vide its email dated 16.08.2019 reverted attaching the account statement as on 31.07.2019. On a perusal of the said account statement, the Corporate Debtor was shell shocked as the Financial Creditor, in contradiction of the restructuring, had conveniently bifurcated the loan agreements and its incidental calculations. Further, since the execution of the restructuring between the parties, this was the first time the Financial Creditor had rescinded from its restructured obligations and arbitrarily reverted to terms of the aforesaid separate loan agreements, which had already been superseded by an agreement between the parties herein. The copy of the account statement substantiating the repayment in terms of the restructuring is annexed as Annexure R-5. Copies of email dated 07.08.2019, 12.08.2019 and 16.08.2019 are annexed as Annexure R-6.

9. The Corporate Debtor vide its email dated 16.08.2019 raised its concerns regarding the account statement provided by the Financial Creditor as the same was contrary to the terms of the restructuring entered into by the parties herein. The Corporate Debtor pointed out that the loan accounts maintained with the Kotak Mahindra Bank Limited stood taken over and thereafter restructured solely in the name of the Corporate Debtor for a sum of Rs. 13,50,00,000/-. However, for reasons best known to the Financial Creditor, the calculations were completely contrary as the same were based on the terms of the erstwhile loan agreement prior to the restructuring. A Copy of the email dated 16.08.2019 sent by the Corporate Debtor to the Financial Creditor is annexed as Annexure R-7.

10. Further, the Corporate Debtor has not come with clean hands, therefore, the present application is not liable to be dismissed rather, the cost may also be imposed under Section 60(5) of the IBC, 2016.

11. The facts mentioned in the rejoinder, in short, is that annexure 6, at page 67 volume-I of the Company Petition comprises of Statement of accounts of the Corporate Debtor in the books of the Financial Creditor and also in the book of Kotak Mahindra Bank Limited (Original lender or assignor) which demonstrate that outstanding as on 23rd April, 2019.

12. Further, in the entire reply, the Corporate Debtor has raised the disputes over the amount of default which cannot be a ground for rejection of an application because if the default is more than of Rs. 1,00,000/- (one lakh) then it is sufficient to trigger Section 7 of the IBC, 2016.

13. Further, the Original Lender has disbursed the loan of Rs. 4,50,00,000/- on 31st January, 2015 and subsequently, that was by assignment agreement dated 29.9.2017, assigned to the present Financial Creditor by the Original Lender and that was done on the request of the Corporate Debtor which was evident from annexure R-3 at page 16 of the Rejoinder.

14. Further, with respect to the additional loan which was given by Suraksha Asset Reconstruction Limited after restructuring, the Suraksha Assets Reconstruction Limited had its own capacity and not as trustee of Suraksha- 012 Trust, granted a financial assistance of INR 3,25,00,000/- to the Corporate Debtor on the terms and conditions contained in the Sanction Letter dated 29.09.2017 issued by Suraksha to the Corporate Debtor and that is the distinct facility.

15. From the credit facility granted by the Original Lender to Dr. Naveen Chaudhri and Mrs. Amita Chaudhari amounting to Rs. 7,65,96,414/- and the Financial Creditor reserves its right to proceed against the individual.

16. We have heard the learned Counsel appearing for the Applicant/Financial Creditor as well as the Corporate Debtor and perused the averments made in the application, reply, rejoinder and the documents filed with the application, reply and rejoinder.

17. Learned Counsel appears for the Financial Creditor, in course of his arguments, submitted that originally on the request of the M/s. Noida Medicare Centre Limited (Corporate Debtor), Kotak Mahindra Bank Limited (Original Lender/Assignor) granted an overdraft facility of INR 4,50,00,000/- only along with the interest compounding at 20% per annum to the Corporate Debtor by Master Fund Base Facility Agreement, annexure 10 at page 207.

18. He further submitted that the said facility was secured by way of mortgage by deposit of title deed together with all the present and future super structure.

19. He further submitted that on 30th June, 2016, the Original Lender declared the account of Corporate Debtor as Non-Performing Asset (NPA) as a result of continuing default in the repayment of the outstanding dues. He further submitted that an assignment agreement dated 29.09.2017 was entered into between the Original Lender and Suraksha Asset Reconstruction Limited (Financial Creditor/Applicant) under the provision of "SARFAESI Act, 2002"

whereby the Financial Creditor acquired financial assets of the Corporate Debtor from the Original Lender as trustee of Suraksha -012, Trust.

20. He further submitted that on the request of the Corporate Debtor vide its letter dated 24.09.2017, the loan facility so availed was restructured by the Financial Creditor/Applicant vide restructuring letter dated 29.09.2017 but due to continued default on the part of the Corporate Debtor on 12th February, 2019, the restructuring letter dated 29.09.2017 stood revoked by revocation letter dated 12th February, 2019 and thereby terminating all the relief and concession granted to the lender by way of restructuring letter dated 29.09.2017.

21. He further submitted that the grounds taken by the Corporate Debtor, in its reply, are erroneous an intangible because Rs. 3,25,00,000/- was granted to the Corporate Debtor in terms of request letter dated 24.09.2017 by the Financial Creditor in its own capacity and not as a trustee of Suraksha - 012 and as such the two facilities are by separate individual entities, which cannot be combined into a consolidated facility.

22. He further submitted that the Corporate Debtor had never denied this fact that he has received the loan and there is no default in payment of the loan, rather, in reply in para (8) admits that he had paid a sum of Rs. 1,17,48,203/- but due to certain disputes, thereafter, the Corporate Debtor stopped the payments.

23. He further submitted that, thus, once a default in terms of Section 4 of the IBC, 2016 is established sufficient cause for initiation of CIRP against the Corporate Debtor is established and that has been decided by the Hon'ble Supreme Court in the matter of Innoventive Industries Ltd. vs. ICICI Bank & Anr. [reported in (2018) 1 SCC 407] and the relevant portion of the decision is quote below:

"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 subsection (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 subsection (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 subsection (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.

30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence 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 that the adjudicating authority may reject an application and not otherwise".

24. On the other hand, Learned Counsel appeared for the Corporate Debtor, in course of arguments, submitted that the entire loan was given by the Kotak Mahindra Bank Pvt. Ltd. stood taken over for Rs. 13.5 crores and once a loan stood settled, the Financial Creditor cannot go beyond the settlement amount and the statement sent by the Financial Creditor to the Corporate Debtor, clearly, demonstrate the loan cost of the Corporate Debtor is of Rs. 13.5 crores.

25. He further submitted that after receiving the processing fees of Rs. 33.50 lakhs and further receiving amount to the tune of Rs. 1,17,48,203/-, after the said restructuring the Financial Creditor could not have terminated the said restructuring unilaterally and therefore, the Financial Creditor has played fraud under Section 60(5) of the IBC, 2016 and liable to be punished.

26. He further submitted that under the garb of the present application, the Financial Creditor intent to pay waive for recovery against the Dr. Naveen Chaudhari and Mrs. Amita Chaudhari.

27. He further submitted that by filing this CA, the Corporate Debtor has annexed the Hon'ble Supreme Court judgment passed on 3rd December, 2019 in the case of M/s. Embassy Property Development Pvt. Ltd. vs. State of Karnataka in which Hon'ble Supreme Court held that the question of fraud can be enquired into by the NCLAT or NCLT in a proceeding initiated under the IBC, 2016.

28. He further submitted that since there is a fraud committed by the Financial Creditor, therefore, the present application is liable to be dismissed and proceeding under Section 60(5) of the IBC, 2016 may be initiated.

29. Now in the light of the submissions raised on behalf of the parties, we have gone through the averments made in the application, rejoinder and the reply as well as the application filed under Section 60(5) of the IBC, 2016, after the closer of the argument by the Corporate Debtor then we find that by filing the reply, the Corporate Debtor admits this fact that originally the loan was sanctioned by Kotak Mahindra Bank Limited but subsequently, the loan was restructured as per the SARFAESI and same was done on the request of the Corporate Debtor, which would be evident from Annexure R-3 enclosed with the Rejoinder at page 16 filed by the Financial Creditor.

30. At this juncture, we have gone through the letter written by the Corporate Debtor on 24.09.2017, which is available at page 16 of the Rejoinder filed by the Financial Creditor and we find that a proposal for acquisition, restructuring of existing facilities of the borrowers and additional funding and on the request of the Corporate Debtor, the Financial Creditor vide assessment agreement dated 29.09.2017, restructuring the loan, which would be evident from the assignment agreement available at page 28 to 46 of the paper book of the main petition filed on behalf of the Financial Creditor.

31. We further find that this restructuring of loan has also admitted by the Corporate Debtor by filing reply and in Para (8) of the reply, the Corporate Debtor admits this fact that in terms of restructuring, the Corporate Debtor had paid a sum of Rs. 1,17,48,203/- and thereafter, he stopped payment due to certain disputes arose between the parties.

32. Therefore, on the basis of that, it can be said that the loan, which was earlier given on 30th June, 2016 declared NPA was subsequently restructured on the request of the Corporate Debtor and as per the restructuring letter dated 29th September, 2017, the Applicant claimed to be a Financial Creditor and therefore, at this juncture, we would like to refer the definition of "Financial Creditor" and the same is quoted below:

Section 5(7) "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or

transferred to.

33. Mere plain reading of the provision shows that a Financial Creditor means a person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred. Here, in this case, we find as per the assignment letter dated 29.09.2017, loan has been assigned to the Applicant by the Kotak Mahindra Bank, the Original Lender, therefore, the Applicant is a Financial Creditor under Section 5(7) of the IBC, 2016 and the outstanding due which the applicant claimed as a Financial Creditor is a financial debt under Section 5(8) of the IBC, 2016.

34. Therefore, we find, no force in the contention raised on behalf of the Learned Counsel appearing for the Corporate Debtor that the applicant is not a Financial Creditor and the amount which the applicant claimed is not a financial debt, rather, we are of the considered view that applicant is Financial Creditor and the outstanding due which the applicant claimed comes under the definition of "financial debt".

35. When we shall consider the case in hand, in the light of the aforesaid decisions then we find that here, in this case, the Corporate Debtor has admitted that the loan which he has taken from the Kotak Mahindra bank Limited assigned by assignment letter dated 29.9.2017 to the applicant and out of the total amount, corporate debtor made part payment but stopped payment subsequently when there arose some disputes and on this ground, he claimed that the present application is not maintainable.

36. When we shall consider this application of the corporate debtor, in the light of the decision, which we have referred in the aforementioned para then we are of the view that in order to trigger Section 7, the Adjudicating Authority is required to consider whether there is a financial debt and there is a default in payment of that debt or not.

37. Now, in the light of the aforesaid facts, when we shall consider the case in hand, then we find that the Corporate Debtor has taken the loan from the Kotak Mahindra Bank Ltd. which was subsequently assigned by assignment letter dated 29.09.2017 to the applicant and that has not been paid and the documents enclosed with the application as well as the rejoinder shows that there is a default in payment of the said debt.

38. We further find that the application is complete, the name of IRP is proposed and the IRP has also accepted the proposal which is at page 25 of the application and there is no disciplinary proceedings pending against the proposed IRP and amount is more than Rs. One Lakh is being the minimum threshold limit fixed under IBC, 2016, hence under such circumstances, this Adjudicating Authority under section 7(5)(a) of Insolvency and Bankruptcy Code, 2016 is inclined to admit this petition and initiate CIRP against the respondent.

39. Accordingly, we hereby admit the application. A moratorium in terms of

Section 14 of the IBC, 2016 shall come into effect forthwith staying:-

- (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 Securitisation 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.

Further:

- (2) 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.
- (3) The provisions of sub-section (1) shall not apply to such transactions as may be notified, by the Central Government in consultation with any financial sector regulator.
- (4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

40. Hence, we appoint, Mr. Chandra Prakash, an Insolvency Professional, registration No. IBBI/IPA-002/IP-N00660/2018-20 19/12023. IRP is directed to follow the rules and regulations as per Section 15, 16, 17 & 18 of IBC.

41. Financial Creditor is directed to deposit the fee of Rs. 2,00,000/- to meet the immediate expenses of the IRP within two weeks. The same shall be fully accountable by the IRP and shall be reimbursed by the CoC, to the Operational Creditor to be recovered as CIR costs.

42. So far, taking action against Section 60(5) of the IBC, 2016 is concerned for the reasons discussed above, in our considered view the decision upon which the Corporate Debtor placed reliance for initiating the proceedings under Section 60(5) of the IBC, 2016 is not maintainable.

43. Hence, the prayer of the Corporate Debtor is hereby, rejected.

44. Registry is directed to communicate the order with the IRP as well both the parties.