

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
PRINCIPAL BENCH

C.P. NO. IB-1446(PB)/2018

IN THE MATTER OF:

Dena BankFinancial Creditor/Petitioner
(now Known as Bank of Baroda)

v.

M/s. Rathi Super Steels Limited
.....Corporate Debtor/Respondent

**SECTION: UNDER SECTION 7 OF THE INSOLVENCY AND
BANKRUPTCY CODE, 2016**

JUDGMENT DELIVERED ON 12.06.2019

CORAM:

CHIEF JUSTICE (RTD.) M.M. KUMAR
HON'BLE PRESIDENT

S.K. MOHAPATRA
HON'BLE MEMBER (T)

PRESENT:

For the Petitioner: Mr. Arun Aggarwal, Advocate
For the Respondent: Mr. Amit Dhall, Mr. A.T. Patra, Mr.
Aditya Ghadge & Mr. Rajat Srivastava,
Advocates

M.M.KUMAR, PRESIDENT

JUDGMENT

The 'Financial Creditor'-Dena Bank (now Known as Bank of Baroda) has filed the instant petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') with a prayer to trigger the Corporate Insolvency Resolution Process in the matter of M/s. Rathi Super Steels Limited.

2. The Corporate Debtor-M/s. Rathi Super Steels Limited is a company registered under the provisions of the Companies Act, 1956 and was incorporated on 22.04.1991. The identification number of the Corporate Debtor is U74899DL1991PLC044043 and its registered office is situated at Flat No. 207, Vardhman Mayur Market at CSC Mayur Vihar, Phase-III, KondliGharoli, Delhi-110096.

3. The Financial Creditor has proposed the name of Resolution Professional, Mr. Harish Chander Arora with the address A-189, Kalkaji, New Delhi-110019 and email id – harisharora2012@gmail.com. His registration number is IBBI/IPA-03/IP-N00077/2017-18/10700. He has filed his written communication which satisfies the requirement of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 along with the certificate of registration.

4. It is submitted by the Petitioner-Bank that being a lead Bank comprising the consortium of 10 member Banks, it had sanctioned and disbursed various credit facilities to the Corporate Debtor aggregating to Rs. 14921 lacs since 2007 onwards till 18.11.2013 and lastly on 15.01.2014 in the form of Term Loans, Cash Credit,

Bank Guarantee and Letter of Credits. The Respondent executed several documents for availing the aforesaid financial assistance from the Petitioner. True Copies of each one of those namely, working capital consortium agreement, inter se agreement/inter creditor agreement, extension of existing memorandum of entry, mortgage letters, FCL/FCDL agreement, omnibus counter guarantee for letter of credit per sanctioned limit, omnibus counter guarantee for bank guarantee per sanctioned limit, joint deed of hypothecation, inter creditor letter by Corporate Debtor, undertaking by Corporate Debtor acknowledging the liability, personal guarantee of Mr. Gaurav Rathi, Corporate Guarantee of Ferrous Investments Pvt. Ltd. and Gaggar Metals Pvt. Ltd. etc. have been placed on record (Annexure A/9 to A/18 & A/21 to A/23).

5. The details of the securities held by, or charge created for the benefit of 'financial creditor'-Bank of Baroda which fulfils the requirements of Section 77 & 78 of Companies Act, 2013 have been given in Part V of the application.

6. It is submitted by the Petitioner-Financial creditor that the account of the Corporate Debtor was classified as NPA by the

petitioner –Financial Creditor on 21.04.2015. Further the bank filed an Original Application (O.A.) No. 431/2017 before the Debts Recovery Tribunal, Delhi for recovery of Rs. 5,58,72,37,042.08/- as on 06.03.2017 along with interest. The said proceeding is pending consideration wherein various interim directions were issued time and again. Further a notice under Section 13 (4) of the Securitisation Act was issued by the Petitioner-Financial creditor and thereafter symbolic possession of the mortgaged property was taken by it.

7. The precise case of the Petitioner is that the total amount in default due to the financial creditor by the corporate debtor as on 30.09.2018 is Rs. 2,33,38,88,632.75/- along with future interest, penal interest and other charges.

8. It is pertinent to mention here that initially present petition was filed by Dena Bank. However, subsequently an application for substitution of cause title was filed being C.A. No. 660(PB)/2019. A prayer to change its name from 'Dena Bank' to 'Bank of Baroda' was made in light of the notification issued on 02.01.2019 in the Gazette of India allowing the merger of Dena Bank-Petitioner with Bank of Baroda. We allowed aforesaid application vide order dated

09.04.2019 subject to all just exceptions and taken on record the amended memo of parties.

9. Learned counsel for the Corporate Debtor has opposed the admission of the petition by asserting that:-

- (i) The Petitioner-Dena Bank, being a corporate entity can act only by or under a Board Resolution or Articles of Association. No Board Resolution of Petitioner Bank has been placed on record. Petitioner Bank has merely filed a power of attorney dated 12.11.2011 which power, in turn, has been given by one Mr. R.P. Acharekar, by virtue of some power of attorney dated 14.06.2004. The said power of attorney dated 14.06.2004 has not been placed on record. In the absence of any Board Resolution or Power of Attorney, Mr. Sidharth Singh who has filed this petition has no lawful authority to institute the petition.
- (ii) The petitioner is resorting to forum shopping firstly before DRT- New Delhi and secondly before this Tribunal which is not permissible under the law.

Besides this, auction proceeding has also been initiated with regard to the mortgage property.

- (iii) The claim of the petitioner is time barred under Section 238A of the Code as the loan account of the Corporate Debtor was declared as NPA on 25.06.2015 though the petition has been filed on 10.10.2018. The document at pg. 525 Annexure 26 stated to be 'acknowledgement of debt' dated 01.12.2016, in order to save the limitation under Section 18 of the Limitation Act, is a fraudulent document and got signed blank by the Petitioner-Bank from the Corporate Debtor at the time of initial loan. The said document seems to have been signed by Mr. Chand Ratan Rathi on 01.12.2016, whereas Mr. Chand Ratan Rathi had already died much prior to that date i.e. on 12.07.2002 which is apparent from a perusal of death certificate of Mr. Chand Ratan Rathi.
- (iv) The Petitioner is not a financial creditor within the meaning of Section 5 (7) of the Code, since the Corporate Debtor does not owe any financial debt to it. The petitioner in the present petition has mentioned about

an alleged debt of Rs. 2,33,38,88,632.75, whereas the Corporate Debtor has filed its claim of Rs. 1556.83 crores against the Petitioner-Bank by way of counter claim in the pending adjudication before the DRT-Delhi.

- (v) In light of the circular dated 12.02.2018 issued by the RBI, the act of the Financial Creditor is discriminated against the Respondent wherein it has adopted a pick and choose approach though larger exposures of the Financial Creditor are there which are in default and the default of the Respondent is comparatively much smaller compared to other debtors.
- (vi) The Respondent Company has been pushed to the present situation because the Petitioner Bank failed to adopt resolution mechanism by implementing that was agreed upon and to release the sanctioned amount.
- (vii) The Corporate Debtor made various requests to the Petitioner Bank to reconcile the accounts and refund the excess amount wrongfully recovered by it along with the interest and cost. The Petitioner-Bank arbitrarily adjusted deposit of payments towards charges and

interest and not towards principal amount and that too without intimation to the Corporate Debtor. This act of the Petitioner-Bank has also caused greater harm and prejudice to the Corporate Debtor.

10. A rejoinder to the reply has been filed by the Financial Creditor reiterating the submissions made in the petition and controverting the assertions in the reply.

11. During pendency of present proceedings, an application being C.A. No. 06(PB)/2018 under Section 340 of Criminal Procedure Code, 1973 has been filed by the Corporate Debtor with a prayer that enquiry be made in respect of filing the fraudulent document by the Petitioner-Bank. It is highlighted in the application that the document at pg. 525 Annexure 26 stated to be 'acknowledgement of debt' dated 01.12.2016, in order to save the period of limitation under Section 18 of the Limitation Act. In fact it is a fraudulent document and got signed blank by the Petitioner-Bank from the Corporate Debtor at the time of initial loan. The said document seems to have been signed by Mr. Chand Ratan Rathi on 01.12.2016, whereas Mr. Chand Ratan Rathi had died much

prior to that date i.e. on 12.07.2002 which is apparent from a perusal of death certificate of Mr. Chand Ratan Rathi.

12. Reply to this application has been filed by the Financial Creditor. It is asserted that the only action what is required by the Financial Creditor as a banker is to match the signatures on the acknowledgment with the available records. It is always believed that whosoever approaches the bank with particular identity or name was truthful and specially when such individuals are accompanied by the official known to the Financial Creditor. Further the identity of the person is to be established by the other signatories on the document. It is nobody's case that the limitation can be claimed only on the basis of the document having been filed on 01.12.2016. In fact, there are three other modes by which it would be clear that the charge was subsisting and enforceable in the Court of law. Lastly it is submitted that the only purpose of the Corporate Debtor is to delay the proceedings by racking such issues and prayed for dismissal of the same.

13. We have heard learned counsel for the parties and have also perused the record.

14. Having heard learned counsel for the parties we are of the considered view that the Financial Creditor-Bank has succeeded to establish a case for triggering the Corporate Insolvency Resolution Process.

15. There is a vital document placed on record namely Power of Attorney (at pgs. 53-57 of the petition) signed and executed by R.P. Acharekar, General Manager of the Bank and further countersigned by Mr. Shalaka Choche, Assistant General Manager (HRM) and Mr. Suresh Pai, Chief Manager (HRM) establishing authority in favour of Mr. Siddarth Singh, Assistant General Manager of the Bank to file the present application. Further letter of authority dated 28.09.2018 issued by Mr. K.V. Singh, Zonal Manager of the Bank in favour of Mr. Siddhart Singh clearly authorized him to prepare and file the application and to accept the service of process on behalf of Dena Bank, Reply, Rejoinders and Affidavits/all other documents and to make corrections, file and take documents or orders, cause inspection of records at the Bench and to appear and argue on behalf of the Bank before the National Company Law Tribunal in connection with the matter and to do other needful acts. The said letter further gives various other

powers to him as well in addition to what has been stated in this para. Even otherwise the Power of Attorney is a widely worded document and it has various clauses empowering the attorney to file any proceedings before Courts or any other fora. Therefore, it is established that the petition has been filed by a person authorized in accordance with law. The affidavit and the vakalatnama have also been signed by the aforesaid officer. Mere non production of power of attorney dated 14.06.2004 by the Financial Creditor would not detain us when the petition has been filed with other vital documents as discussed in this para. In view thereof, we do not find any substance in the objection raised on behalf of respondent.

16. The Financial Creditor has placed various documents in relation to the disbursement of different kinds of loan to the Respondent Company. The materials on record and the loan documents clearly depicts that the loan was sanctioned, disbursed and the loan agreements were properly executed. Respondent company utilized and enjoyed the loan facilities. Apart the other documents the Financial Creditor has relied upon the letters of

respondent company confirming creation of mortgage by deposit of title deeds in order to secure the loan.

17. In addition, the Financial Creditor has filed the relevant statement of accounts duly certified in accordance with Banker's Book Evidence Act, 1891 as per the requirement of Form 1 Part V Column 7 of the application. True copy of statement of accounts submitted by the Financial Creditor pertaining to various loan facilities, kept during the course of banking business, basing on which the claim has been raised, can be termed as sufficient evidence of the financial debt.

18. Section 4 of the Bankers' Books Evidence Act, 1891 provide for mode of proof of entries in bankers' books and the same read as under:-

"Section 4. Mode of proof of entries in bankers'

books.- Subject to the provisions of this Act, a certified copy of any entry in a banker's books shall in all legal proceedings be received as *prima facie* evidence of the existence of such entry, and shall be admitted as evidence of the matters, transactions and accounts therein recorded in every case where, and to the same

extent as, the original entry itself is now by law admissible, but not further or otherwise.”

19. A perusal of the aforesaid provision would show that a certified copy of entry in a banker's books is to be regarded as *prima facie* evidence in all legal proceedings with regard to the existence of such entry. It must be admitted as evidence of the matters, transactions and accounts therein recorded in every case. It has come on record that a certificate of entries in a banker's books in accordance with the Banker's Books Evidence Act, 1891 has been placed before us (at pgs. 513-514) certifying that the statements of accounts filed along with the application are maintained by it in their ordinary course of business.

20. As regards allegation of charging excessive rate of interest, the Financial Creditor has stated that the interest has been charged in accordance with the terms of sanction letter from time to time. It is submitted that the amount claimed in Part-IV of the application is based on the statement of Accounts maintained by the Bank in its ordinary and usual course of business and in accordance with the banking systems.

21. One of the objections of the Corporate Debtor is that the petitioner is resorting to forum shopping firstly before DRT- New Delhi and secondly before this Tribunal. Such an argument looks attractive at the first blush but lacks substance because the pendency of any proceeding much less before the DRT-Delhi does not create a bar for initiation of Corporate Insolvency Resolution Process against a Corporate Debtor. In that regard reliance may be placed on the observation made by Hon'ble the Supreme Court in the case of ***Innoventive Industries Ltd. v. ICICI Bank and Ors.*** (2018) 1 SCC 407. Referring to Section 238 of the Code it has been held that the later non-obstante clause of the Parliamentary enactment would prevail over the limited non-obstante clause of any earlier enactment. Therefore, the pendency of proceeding under the provisions of the SARFAESI Act would not exclude the jurisdiction of the Tribunal under the Insolvency and Bankruptcy Code, 2016. Therefore, we have no hesitation to reject the aforesaid argument.

22. There is no room for other argument advanced on behalf of the Corporate Debtor that the limitation period of three years applies because it could not be disputed that the mortgage

property is under the first charge of the Petitioner-Bank. Therefore, the provisions of Article 137 of the schedule of the Limitation Act, 1963 would not apply. On the contrary the provisions of Article 62 of the schedule of the Limitation Act, 1963 would apply which provides for 12 years period of limitation.

23. The argument would not be acceptable because we find that RBI Circular dated 12.02.2018 has now been declared illegal and ultra vires of Section 35AA of the Banking Regulations Act, 1949. It is pertinent to mention here that aforesaid circular was challenged before Hon'ble the Supreme Court in the case of ***Dharani Sugars and Chemicals Ltd. v. Union of India & Ors.*** (Transferred Case (civil) No.66 of 2018, decided on 02.04.2019). The circular has been declared as violative of Section 35AA of the Banking Regulations Act, 1949. Once the circular dated 12.02.2018 has been declared illegal, the argument will not survive and is hereby rejected.

24. The argument with respect to fabrication of document at pg. 525 Annexure 26 dated 01.12.2016 by the Bank officials may now be considered. The Bank Officials were required to be vigilant and careful because Mr. Chand Ratan Rathi has expired on 12.07.2002

and this document is dated 01.12.2016. Apparently, it has been put on record under the mistaken belief that the period of limitation is three years. However, as we have already held in para 21 of this order that the provisions of Article 62 of the schedule of the Limitation Act, 1963 is attracted to the facts of the present case which provides for 12 years period of limitation. Therefore, we direct the Management of the Bank of Baroda to warn the officials of the Bank to refrain from bringing before Court of law any such document which are glaringly unacceptable. We also refuse to take the aforesaid document on record. The fabrication, if any, has been done outside the precincts of this Tribunal therefore, complaint, if any, could be initiated in a criminal Court (See Section 195 (1) (b) Criminal Procedure Code, 1973. We do not say anything more on this issue.

25. Learned counsel for the petitioner has argued that all requirements of Section 7 for the initiation of Corporate Insolvency Resolution Process by a Financial Creditor stand fulfilled. In that regard, he has submitted that the petition as prescribed by Rule 4 (1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Section 7 (2) of IBC is complete

in all respects. He has further submitted that the details of the default along with the dates have been stated in part IV and the additional documents have been submitted subsequently along with all the minute details. There is overwhelming evidence available to prove default and name of the resolution professional has been specified who does not suffer from any disqualification.

26. Under sub-section 5(a) of section 7 of the code, the application filed by the petitioner financial creditor has to be admitted on satisfaction that:

- (i) Default has occurred;
- (ii) Application is complete, and
- (iii) No disciplinary proceeding against the proposed IRP is pending.

27. After a conjoint reading of the aforesaid provision along with Rule 4 (2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, we are satisfied that a default has occurred and the application under sub section 2 of Section 7 is complete. The IRP proposed does not have any disciplinary proceedings pending against him.

28. In view of the above we find that there was an advancement of loan and default on part of the respondent- corporate debtor is established. Even Otherwise there is overwhelming documentary evidence on record which support those findings.

29. As a sequel to the above discussion, this petition is admitted and Mr. Harish Chander Arora is appointed as the Interim Resolution Professional.

30. We also declare moratorium in terms of Section 14 of the Code. It is made clear that the provisions of moratorium are not to apply to transactions which might be notified by the Central Government. Additionally, the supply of essential goods or services to the Corporate Debtor as may be specified is not to be terminated or suspended or interrupted during the moratorium period. These would include supply of water, electricity and similar other supplies of goods or services as provided by Regulation 32 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

31. In pursuance of Section 13 (2) of the Code, we direct that Interim Insolvency Resolution Professional shall immediately (3 days) make public announcement with regard to admission of this

application under Section 7 of the Code. The public announcement is required to be made in all territories/areas where the business have been transacted by the Corporate Debtor so that all stakeholders may have noticed of the fact that Corporate Insolvency Resolution Process has been triggered in respect of the Corporate Debtor.

32. We direct the Financial Creditor to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional 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 amount however be subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the Financial Creditor.

33. Before parting we must notice a general complaint being agitated against Financial Creditors, Banks, NBFC and Asset Reconstruction Companies for charging exorbitant rates of interest or compounding of interest on penal rates of interest or

discrepancies in the statement of account. We cannot determine the amount due. Therefore, Resolution Professional may ask the ex-promoter/director of the Corporate Debtor for any such correction if need be and act accordingly.

34. 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, NCR, New Delhi at the earliest 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.

Sd/-

(M.M. KUMAR)
PRESIDENT

Sd/-

(S.K. MOHAPATRA)
MEMBER(TECHNICAL)

12.06.2019
Vineet