

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH**

CP 1661 (IB)/MB/2017

Under Section 7 of the I&B Code, 2016

In the matter of

**The Greater Bombay Co-operative Bank
Limited**

...Financial Creditor/ Petitioner

v/s

**Penguin Umbrella Works Private
Limited**

...Corporate Debtor

Order dated 12th June 2019

Coram: Hon'ble Member (Judicial), Mr V.P. Singh

Hon'ble Member (Technical), Mr Ravikumar Duraisamy

For the Petitioner: Adv. Anuja Bhansali

For the Respondent: Adv. Hetal Jobanputra and Adv. Bhairavi Warvdekar

Per V.P. Singh, Member (Judicial)

ORDER

1. This is a petition being CP 1661/2017 filed by The Greater Bombay Co-operative Bank Limited, Financial Creditor or Petitioner, under section 7 of Insolvency & Bankruptcy Code, 2016 (**I&B Code**) against Penguin Umbrella Works Private Limited, Corporate Debtor, for initiating Corporate Insolvency Resolution Process (**CIRP**) for default in repayment of ₹9,11,08,439.37/- including interest and other charges. The Petition is filed on 28.11.2017.
2. The facts of the case are that the Corporate Debtor entered into a Cash Credit facility agreement with the Petitioner on 03.04.2000 for a cash credit facility of ₹2,10,00,000/- as a Cash

Credit Limit repayable on or before 31.03.2001 at an interest of 17% p.a. The loan was secured by hypothecation of stock of goods-in-trade, book debt and mortgage of immovable property. A copy of this agreement is annexed with the Petition.

3. The Corporate Debtor has also executed a Promissory Note dated 7.4.2000, a form of declarations to the constitution of the Firm dated 7.4.2000, continuing security letter dated 7.4.2000 and letter of lien and set off dated 7.4.2000 in favour of the Petitioner to secure repayment of ₹2,10,00,000/-. A copy of the said note is annexed with the Petition.
4. The Corporate Debtor entered into another loan agreement with the Petitioner on 27.04.2001 for a loan of ₹44,22,000/- repayable on or before October, 2001 at an interest of 16% p.a. The loan was secured by hypothecation of stock of goods-in-trade, book debt and mortgage of immovable property. A copy of this agreement is annexed with the Petition.
5. The Corporate Debtor has also executed a Promissory Note dated 27.4.2001, a form of declaration as to the constitution of the Firm dated 27.4.2001, continuing security letter dated 27.4.2001 and letter of lien and setoff dated 27.4.2001 in favour of the Petitioner to secure repayment of ₹44,22,000/-. A copy of the said documents annexed with the Petition.
6. The Petitioner had filed two recovery application in which the Assistant Registrar, Co-operative Societies, Government of Maharashtra, Mumbai has issued two recovery certificates dated 07.12.2004 for an amount of ₹48,08,145/- and ₹2,40,66,865.37/- plus interest on principal amount against the Corporate Debtor, Mr. Nirmal Phophalia (Director) and Mr. Hemang Phophalia (Director) and Ms. Reena Phophalia. It is submitted by the Petitioner in its affidavit in the rejoinder that in the execution of the said Recovery Certificates, the Special Recovery and Sales Officer executed and recovered the following properties of the Respondent Company and appropriated to the account of the Respondent Company:

| Sr. No. | Description of Property | Date of Sale | Amount Recovered (in ₹) |
|--|-------------------------------------|--------------|-------------------------|
| 1. | Office premises at Prabhat, Belapur | 30.03.2005 | 5,00,000/- |
| 2. | Flat at Pune | 30.03.2005 | 15,97,944/- |
| 3. | Office Premises at Pune | 30.03.2005 | 9,51,000/- |
| The total amount recovered as on 30.03.2005 | | | 30,48,944/- |

7. The Petitioner has submitted that Ms Jyoti, who is the mother of Mr Hemang Phophalia had initiated Dispute Application No.114 of 2003 in respect to mortgage created on Flat B-13 before the Ld. Co-operative Court for restraining the Bank from dispossessing her from the said flat. The said Dispute Application was dismissed by Order dated 29.5.2007, and the Appeal against the dismissal order was also dismissed by the Ld. Co-operative Appellate Court by its order dated 5.2.2008.
8. It is further stated that on or about 27.03.2008, Ms Jyoti filed a Writ Petition No.2041 of 2008 against the order dated 5.2.2008 dismissing the Appeal No.97 of 2007 as well as the action taken by the Special Recovery and Sales Officer under notice Before Judgment dated 17.3.2008 on 18.3.2008. Eventually, vide order dated 7.5.2008, the Special Recovery and Sales Officer directed Respondent company and its directors/guarantors to deposit 50% of the recovery amount (as per the said Recovery Certificates) on or before 20.5.2008. Ms. Jyoti preferred a Revision Application No.231 of 2008 against the said order dated 7.5.2008 and the Divisional Joint Registrar admitted the Revision Application and directed all parties to maintain status quo. There was a stay from 19.6.2008 operating on the Execution Proceedings initiated by the Petitioner-Bank.

9. It is stated that by order dated 14.7.2008 passed in Writ Petition No.2041 of 2008, the Hon'ble Bombay Court granted part reliefs in terms of stay of action by the Bank in terms of the notice before Judgement dated 17.3.2008 and directed Ms Jyoti to deposit ₹50,00,000/- (Rupees Fifty lakhs only) within 8 weeks and liberty given to Bank to withdraw the same. Ms Jyoti Phophalia failed to deposit the same as per the directions of Hon'ble Bombay High Court. The Bank was also given liberty to sell the Flat No.B-12. In the Revision Application No. 231 of 2008, the DJR vide Order dated 28.5.2009, set aside the order dated 7.5.2008 passed by the SRO directing the Respondent and its directors to deposit 50% of the amounts as per the said Recovery Certificates. Being aggrieved by the said order, the Bank preferred a Writ Petition No. 2344 of 2009 before the Hon'ble High Court and the Court vide order dated 13.1.2010 granted ad-interim stay on order dated 28.5.2009 passed by the Division Joint Registrar.
10. It is stated that aggrieved by the action of the Bank, Ms Jyoti moved the Hon'ble Bombay High Court in the pending Writ Petition 2344 of 2009 (filed by the Bank) and as per Order dated 17.2.2010, Ms Jyoti was directed not to sell, alienate, encumber, part with possession and/or create any third party rights in respect of the said Flat. Further, directions were also passed to place the Writ Petition No.2344 of 2009 for final hearing and disposal. Therefore, the interim order dated 13.1.2009 was effectively vacated as the Bank could not proceed with execution proceedings. In the meantime, the SRO initiated Auction proceedings of Flat No.B-12 on or about 8 December 2010. On 26.2.2011, the Bank purchased the said Flat No.B-12 in public Auction for ₹2,02,00,000/- (Two crores two lakhs only) and gave due credit to the same to the cash credit account of the Respondent Company.
11. It is thus submitted that due to the order dated 17.2.2010, the Bank was unable to proceed with the execution of the Recovery Certificates due by the Respondent Company. The said Writ

Petition No.2344 of 2009 was after that listed on several occasions but not heard nor was the order dated 17.2.2010 vacated. As per order dated 30.11.2018, the Writ Petition No.2344 of 2009 was disposed of, and order dated 28.5.2009 passed by the Division Joint Registrar was set aside. However, the interim protection granted vide Order dated 17.2.2010 was continued, and the Revision Application No.231 of 2008 was remanded for re-adjudication.

12. In light of the above circumstances the Petitioner has submitted that the period from 07.05.2008 till date is to be excluded, in accordance with section 15(1) of Limitation Act, 1963, for calculation of limitation on account of stay operating on the order dated 07.05.2008, the recovery pursuant to the said recovery certificates has come to a standstill. It is submitted that vide order dated 21.01.2019 the DJR has confirmed the action taken under notice dated 07.05.2008.
13. The Corporate Debtor filed its affidavit in reply dated 14.01.2019 objecting the admission of the petition because it is barred by the principles of *Res judicata* as the same issue has already been adjudicated by the Maharashtra Co-operative Court under Maharashtra Co-operative Societies Act, 1960. The Respondent has also challenged the petition on the grounds of it being barred by limitation.
14. The Corporate Debtor submits that it applied for Cash Credit facility to the tune of ₹3,00,00,000/- and was sanctioned Cash Credit facility for ₹2,10,00,000/- on 3.4.2000 and a Term Loan facility for ₹44,22,000/- on 23.3.2001. The account of the Corporate Debtor was classified as NPA on 1.1.2002. This as per the Corporate Debtor is the date of cause of action.
15. The Corporate Debtor submits that the Petitioner initiated the recovery proceedings and was granted Recovery Certificates dated 7.12.2004 for ₹47,96,420/- and ₹2,40,55,055.37 under section 101 of the Maharashtra Co-operative Societies Act, 1960. Under the Recovery Certificates, it is stated, that the Petitioner

sold 5(Five) properties that were attached as collateral securities in the year 2004. The amount recovered from the said sale is stated to be not adjusted in the principal amount. It is contended that it would be the jurisdiction of the Civil Court to determine in what manner and in what circumstances have the amounts been appropriated.

16. The Corporate Debtor placed reliance on the judgement of Hon'ble Supreme Court in B.K. Educational Services Pvt. Ltd. v/s. Parag Gupta & Associates to state that Limitation Act would be applicable on the proceedings before this Tribunal. It is stated that the cause of action arose on 1.1.2002 when its account was declared as NPA. It is further contended that if not the date of NPA, then the date of Recovery Certificates would be the date of cause of action for calculating the period of limitation. It is contended that the execution process is to be completed within a period 12 years from the date of Recovery Certificates as per the Limitation Act. Therefore, the present proceedings that are filed in November 2017 are beyond the period of 12 years prescribed under the Limitation Act.
17. The Corporate Debtor states that it did not challenge the said Recovery Certificates and permitted execution of the decree by which properties were sold during the years 2004 to 2011. It is stated that the Petitioner failed to give details of appropriations of the money recovered from the sale of properties and appears to have appropriated this amount towards the interest which was not provided for in the loan facility Agreements. It is also contended that the Recovery Certificates are a decree in itself, and the Petitioner cannot avail multiple remedies in respect of the same cause of action by filing present proceedings.
18. The Corporate Debtor states that it gave a cheque of ₹80,00,000/- to the Petitioner in the year 2002, but the Petitioner did not encash the cheque even after being asked to do so vide the letter of the Corporate Debtor dated 22.3.2002. The Corporate Debtor has annexed the letter dated 22.03.2002 with its affidavit in reply.

19. The Petitioner filed its Affidavit in Rejoinder on 4.2.2019 stating that the recovery certificates have only crystallised the debt and that the Bank has not come to this Tribunal for enforcement of the recovery certificates as alleged by the respondent. The Petitioner has relied upon the article 136 of the Limitation Act, 1963 and section 15(1) to state that the Corporate Debtor defaulted in making payment under the order dated 07.05.2008 and further, the period from the 28.05.2009 shall be excluded for calculation of limitation period as there was a stay upon the execution proceedings.
20. We have heard arguments for both the sides and perused the records.
21. The Petition is filed by Mrs Shraddha Amaldar, who is authorised to file the present petition vide board resolution dated 15.05.2017.
22. The Corporate Debtor has sanctioned Cash Credit facility for ₹2,10,00,000/- on 3.4.2000 and a Term Loan facility for ₹44,22,000/- on 23.3.2001. The loan is admitted by the Corporate Debtor, and there is no dispute as to the existence of the debt. The two recovery certificates issued by Assistant Registrar of Co-operative Societies are also annexed to the petition that is also not disputed by the Corporate Debtor.
23. It is settled the position of law that this Tribunal as Adjudicating Authority does not have to determine the quantum of debt at the stage of admission of the petition but only determine that the amount of debt and default is more than the stipulated threshold of ₹1,00,000/-. The Corporate Debtor has sent a letter dated 07.02.2017 offering the Petitioner an amount of ₹5,00,00,000/- as a full and final settlement of its entire due. However, the Petitioner-Bank has refused to the settlement proposal of the Corporate Debtor. This establishes the debt and default very well over ₹1,00,000/-.
24. Concerning the argument of the Corporate Debtor that the debt is time-barred, the Petitioner has sought exclusion of time under

section 15 of the Limitation Act, 1963. We are of the view that the contention of the Petitioner is correct as there was stay over the execution of recovery certificates and due to the stay orders, the recovery certificates could not be executed, therefore the period during which the execution proceedings were stayed needs to be excluded for counting period of limitation. The period from 07.05.2008 till 21.01.2019 is to be excluded as the order dated 07.05.2008 whereby SRO directed the Corporate Debtor to deposit 50% of the decretal amount was stayed by the DJR vide order dated 28.05.2009 in Revision Application No. 231 of 2008 and subsequently vide order dated 30.11.2018 the said Revision Application No. 231 of 2008 has been sent back to the DJR for re-adjudication. As per submissions of the Petitioner, vide order dated 21.01.2019 the DJR has confirmed the action taken under notice dated 07.05.2008.

25. The contention of the Corporate Debtor that the Petition is barred by the principles of *Res judicata* as the same issue has already been adjudicated by the Maharashtra Co-operative Court under Maharashtra Co-operative Societies Act, 1960 is not tenable as the present proceedings are not recovery proceedings or execution proceedings but are for resolution of insolvency of the Corporate Debtor.
26. The Petitioner has placed reliance upon the decision of Hon'ble NCLAT in *Pushpa Shah & Anr. Vs IL&FS Financial Services Limited, Company Appeal (AT) (Insolvency) No. 521 of 2018* in an order dated 21.01.2019 to show that the pending proceedings would make it a continuous cause of action and therefore the Petition is within the limitation period. The Petitioner has cited order of this Bench in the matter of *Asset Reconstruction Company (India) Limited vs Shivam Water Treaters Private Limited, CP 1882/I&BP/NCLT/MAH/2018* in order dated 15.10.2018 to emphasise that the Limitation period for execution of recovery certificate is Twelve years as per article 136 of the Limitation Act, 1963.

27. The Corporate Debtor has relied on the order of the Hon'ble NCLT, Principal Bench in the matter of *Deem Roll-Tech Limited vs. R.L. Steel & Energy Limited, Company Appeal No. (I.B.) 24/PB/2017* in order dated 31.03.2017 to emphasise that once a decree is obtained from the civil court in relation to the amounts claimed, the petitioner can have it enforced before the appropriate authority and cannot file an application before this Tribunal for execution of the decree and venture into forum shopping.
28. In the present petition, the debt and default are established. The Corporate Debtor could not show that either no debt of more than ₹1,00,000/- is due, payable and in default.
29. The petition is well within limitation.
30. The Petitioner has proposed the name of Mr.Vijay Pitamber Lulla, a registered insolvency resolution professional having Registration Number [IBBI/IPA-001/IP-P00323/2017-18/10593] as **Interim Resolution Professional**, to carry out the functions as mentioned under I&B Code, and given his declaration; no disciplinary proceedings are pending against him.
31. The Application under sub-section (2) of Section 7 of I&B Code, 2016 is complete. The existing financial debt of more than rupees one lakh against the corporate debtor and its default is also proved. Accordingly, the petition filed under section 7 of the Insolvency and Bankruptcy Code for initiation of corporate insolvency resolution process against the corporate debtor deserves to be admitted.

ORDER

This petition filed under Section 7 of I&B Code, 2016, against the Corporate Debtor for initiating corporate insolvency resolution process is at this moment admitted. We further declare moratorium u/s 14 of I&B Code with consequential directions as mentioned below:

- I. That this Bench as a result of this prohibits:

- 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 possession of the corporate debtor.
- II. That the supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period.
- III. That the provisions of sub-section (1) of Section 14 of I&B Code shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- IV. That the order of moratorium shall have effect from the date of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 of I&B Code or passes an order for the liquidation of the corporate debtor under section 33 of I&B Code, as the case may be.
- V. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of I&B Code.

VI. That this Bench at this moment appoints Mr.Vijay Pitamber Lulla, a registered insolvency resolution professional having Registration Number [IBBI/IPA-001/IP-P00323/2017-18/10593] as Interim Resolution Professional to carry out the functions as mentioned under I&B Code, fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard.

32. The Registry is at this moment directed to immediately communicate this order to the Financial Creditor, the Corporate Debtor and the Interim Resolution Professional even by way of email or WhatsApp. **Compliance report of the order by Designated registrar is to be submitted today.**

Sd/-

RAVIKUMAR DURAISAMY
Member (Technical)

Sd/-

V.P. SINGH
Member (Judicial)

12th June 2019