

IN THE NATIONAL COMPANY LAW TRIBUNAL: NEW DELHI
PRINCIPAL BENCH

(IB)-1493(PB)/2018

IN THE MATTER OF:

Enkay (India) Rubber Co. Pvt. Ltd.
Vs.

.... Applicant/petitioner

Sumeru Processors Pvt. Ltd.

.... Respondent

Order under Section 7 of IBC, 2016

Order delivered on 15.04.2019

Coram:

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

SH. S. K. MOHAPATRA
HON'BLE MEMBER (TECHNICAL)

PRESENT:

For the Petitioner/Applicant: Mr. G.K. Jain, CA

For the respondent

Mr. Narendra M. Sharma and Ms. Anindita Saha,
Mr. Aditya Singh, Advs.

ORDER

M.M. KUMAR, PRESIDENT

The Petitioner claiming to be financial creditor has filed the instant Petition 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 Sumeru Processors Pvt Limited (for brevity the 'corporate debtor').

2. The Corporate Debtor – Sumeru Processors Pvt Ltd was incorporated on 13.05.1986 under the provisions of the

Companies Act. The identification number of the Corporate Debtor given is CIN U51909DL1986PTC024201.

3. It is submitted by the Petitioner that it had made payment to the tune of Rs. 25 Lakhs by depositing the amount through RTGS in the Bank Account of the respondent – corporate debtor against which the respondent had signed a Promissory Note **(Annexure A-2)**. As per the terms and conditions the amount was repayable on demand along with an interest @15% per annum from the date of signing the promissory note. The bank statement has also been placed on record **(Annexure A-1)**.

4. The precise case of the Petitioners is that the total amount in default due to the financial creditor by the corporate debtor is Rs. 30,24,412/- including interest @15% per annum upto 30.09.2018. The statement showing the computation of the outstanding amount is depicted in tabular form **(Annexure A-3)**.

5. The Financial Creditor has proposed the name of Mr. Vijender Sharma as the Insolvency Professional with the address VRSA Insolvency Professionals LLP, Building No.11,

3rd Floor, Hargovind Enclave, Vikas Marg, New Delhi - 110092 and E-mail-id - vijender@vsa.net.in. His registration number is IBBI/IPA-003/IP-N00003/2016-17/10022. 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 and the same is placed on record.

6. In Part-IV of the Petition, the Financial Creditor has given the details of the total amount of the financial debt along with the dates of disbursement. In Column 2 of Part-IV of the Application the Financial Creditor has mentioned the amount claimed in default and the date of the default.

7. In Part V of the Petition the Financial Creditor has mentioned the particulars of the documents and records that substantiate the amount disbursed and the amount claimed to be in default. A bare perusal of the documents would reveal the quantum of amount disbursed and claimed to be in default.



8. A reply to the petition is filed by one Mr. Dhiren Navlakha, being the Power of Attorney Holder of the Respondent-Corporate Debtor, who has been given authority vide Power of Attorney dated 09.04.2010 and a rejoinder to the reply has also been filed.
9. On behalf of the corporate debtor two objections have been raised. It has been argued by Mr. Narendra M. Sharma, that the board resolution dated 10.05.2018 only talks of making recovery of the amount due from the corporate debtor and the present proceedings cannot by any stretch of imagination be considered as recovery proceedings. Therefore, the authorisation cannot be considered for initiation of insolvency resolution process. The second submission is raised on the basis that the petition has to be filed by the financial creditor itself nor through special Power of Attorney holder of the financial creditor Mr. G.K Jain, Chartered Accountant. However, the factum of the total amount of debt granted, disbursed and the amount claimed with interest could not be successfully disputed.



10. As a matter of fact, when the matter came before us in the first round of litigation, an objection was raised on 14.09.2018 (**Annexure - A4**) which resulted in passing the following order:-

"This petition U/s. 7 has been filed on the basis of a promissory Note dated 03.11.2015 showing the debt of Rs. 25,00,000/- and its disbursement. The rate of interest has also been mentioned to be 15% per annum compounded on monthly basis amounting to Rs. 3,30,677/-. The statement of account of Bank of India as on 09.12.2015 has been attached (Annexure A-1) which shows the disbursement of Rs. 25,00,000/- to the respondent. A primary feature of Promissory Note which emerges from its perusal is that it is payable on demand and no period for repayment has been fixed. It is pointed out by the Ld. Counsel for the respondent that demand notice is purported to have been sent on 30.4.2018(Annexure- A4) at the address of registered office of the respondent company. However, the postal receipt shows (Annexure-A5) that it was directed at a different address. It has therefore been argued that without first raising the demand, the debt under Promissory Note would not become payable. It has further been submitted that U/s 19 of the Negotiable Instruments Act, the requirement of law applicable to Promissory note by raising the demand has not been satisfied and therefore the amount would not become payable.

Faced with the aforesaid submission, Mr. G.K. Jain, Chartered Accountant/Special power of Attorney Holder has submitted that the present petition itself may be regarded as a demand notice and infact now the copy of the demand notice itself is with the respondent. Therefore, it may be regarded as raising of demand under the promissory note.

Ld. Counsel for the respondent have also raised other objections with regard to the competence of filing the petition by a special power of attorney. The aforesaid objection does not need to be dealt with at this stage in the light of the view which we are taking in this matter.

Having heard the Ld. Counsel, we are of the view that the demand notice has now been issued to the respondent and the same be treated to have been served on this date i.e. 14.09.2018. The parties are left to avail the remedies in accordance with the law hereinafter.

In view of the above the petition is dismissed by giving liberty to the parties to avail the remedy in accordance with law. However, the demand notice based on promissory note is deemed to be served on the respondent.”

After the aforesaid date no payment has been made and the default continues.

11. In response to the two objections raised, Mr. G.K Jain, Chartered Accountant has placed reliance on the observation made by Hon'ble the Supreme Court in the case **of Macquarie Bank Limited v. Shilpi Cable Technologies Limited, 2018(2) SCC 674**. Placing reliance on the observation made in para 38, Mr. Jain has argued that the Supreme Court has held that a notice of operational creditor can always be given by an authorised agent or by a lawyer.

The arguments seems to be that if under Section 8 of the



Code, 2016, notice could be given by authorised agent then in proceeding before the court an authorised agent can also appear. It has also been observed by their lordship of Hon'ble the Supreme Court that the aforesaid observations have been fleshed out in Forms – III and V appended to the Adjudicating Authority Rules, 2016. Placing reliance on various Forms and the Schedule mentioned therein which has a specified column for recording the details of the Authorised Person to submit the application, Mr. Jain has argued that it is evident from the said columns an authorised agent is given entitlement to appear on behalf of the financial creditor.

12. Having heard the learned counsel for the parties, we are of the view that the objections raised by the corporate debtor do not warrant any serious consideration. It is true that the proceedings under Section 7 of the Code, 2016 are not recovery proceedings yet in the resolution dated 10.05.2018 the financial creditor has been referring to the respondent as a corporate debtor which indicate the language used in the Code. Moreover, if the corporate debtor is unable to pay then the default occurs and the amount becomes due and payable within the meaning of Section 3 (12) of the Code and the



Corporate Insolvency Resolution Process has to be initiated if the application is complete in all other respect. Therefore, the objection is devoid of any merit and the same is overruled. In so far as the second objection is concerned, Mr. Jain himself is a qualified Chartered Accountant and under Section 432 of the Companies Act, 2013 read with Rule 45 of NCLT Rules, 2016 Advocates, Chartered Accountants, Cost Accountants and Company Secretaries have the right of audience before the NCLT and the resolution dated 10.05.2018, in para 2 has specifically authorised Mr. G.K Jain, to sign any document for and on behalf of the financial creditor and to certify the statements. Mr. Naresh Jain is authorised to execute power of attorney for appearance before this Tribunal. He has been given power of attorney by Mr. Naresh Jain who is one of the director of the financial creditor. Therefore, there is no bar once the Companies Act, itself has recognised the right of audience of a Chartered Accountant to appear and argue these matters and we do not find any substance in the objections raised.

13. In view of the aforesaid statement made by the learned counsel for the Respondent-Corporate Debtor, we find that

disbursement of the amount and default stand admitted. Even Otherwise there is overwhelming documentary evidence on record which support those findings.

14. Learned Counsel for the petitioner has argued that all requirements of Section 7 of the Code for initiation of Corporate Insolvency Resolution Process stand fulfilled.
15. Having heard the learned counsels for the Financial Creditor and Corporate Debtor and having perused the paper book with their able assistance we find that the provisions of Section 7 (2) and Section 7 (5) of IBC have been complied with as discussed in detail in our Order dated 27.11.18 rendered in the case of ECL Finance Limited vs. Digamber Buildcon Pvt Ltd (IB- 1039(PB)/2018).
16. 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 name of the IRP has been proposed and there are no disciplinary proceedings pending against the proposed Interim Resolution Professional.



17. As a sequel to the above discussion, this petition is admitted and Mr. Vijender Sharma is appointed as the Interim Resolution Professional.

18. 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 and a surety in a contract of guarantee to a corporate debtor. 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.

19. 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.



20. We direct the Financial Creditor to deposit a sum of Rs. 2 Lacs with the Interim Resolution Professional namely Mr. Vijender Sharma 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.

21. The office is directed to communicate a copy of the order to the Financial Creditor, the Corporate Debtor and the Interim Resolution Professional at the earliest but not later than seven days from today. A copy of this order be also sent to the ROC for updating the Master Data. ROC shall send compliance report to the Registrar, NCLT.

Sd/-

(M. M. KUMAR)
PRESIDENT

15.04.2019

Sd/-

(S. K. MOHAPATRA)
MEMBER (TECHNICAL)

15.04.2019.
(Vidya)