

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI
BENCH- III**

C.P. IB-22/ND/2018

In a matter of Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency & Bankruptcy Code (Application to Adjudicating Authority) Rules, 2016 and Section 424 of the Companies Act, 2013

IN THE MATTER OF

Oriental Bank of Commerce

...Applicant

Versus

Shekhar Resorts Ltd. & Ors.

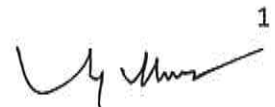
...Respondents

MEMO OF PARTIES

**ORIENTAL BANK OF COMMERCE,
251, Jaipur House,
Loha Mandi Agra,
Agra - 282010.**

...Applicant

Versus

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1. M/S SHEKHAR RESORTS LIMITED,
Registered Office:
J-1817, Chittaranjan Park,
New Delhi -110019.

...Respondent No. 1

2. SHRI NARESH KUMAR SHARMA,
R/o J-1817, Chittaranjan Park,
New Delhi – 110019.

...Respondent No. 2

3. SHRI CHANDRA SHEKHAR SHARMA,
R/o J-1817, Chittaranjan Park,
New Delhi – 110019.

...Respondent No. 3

4. SHRI K. K. SHARMA,
R/o J-1817, Chittaranjan Park,
New Delhi – 110019.

...Respondent No. 3

Coram:

R.VARADHARAJAN,
Hon'ble Member (JUDICIAL)

DR. V. K. SUBBURAJ,
Hon'ble Member (TECHNICAL)

Counsel for the Petitioner : H. P. Bhardwaj, Advocate
Counsel for the Respondent : P. Verma, Arvind Chari, Advocates

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ORDER

Delivered on:11.09.2018

1. This is an application filed by the Applicant under Section 7 of the Insolvency and Bankruptcy Code, 2016 (“the Code”) for initiating Corporate Insolvency Resolution Process (“CIRP”) against Shekhar Resorts Limited (“R1”) for non-payment of debt amounting to Rs.19,67,64,134 including interest.

2. The facts leading up to the present application are as follows:
 - a. R1 approached the Applicant for fund based and non-fund based financial facilities for the completion of construction of five-star hotel/resort namely, Shekhar Resort. The Applicant sanctioned the following facilities on 20.11.2008:
 - i. Term loan amounting to Rs.2,000 lakhs
 - ii. Letter of Credit (Inland/Foreign) of Rs. 400 lakhs for one time of import of the capital goods.
 - iii. Bank guarantee (performance/financial) amounting to Rs. 150 lakhs for the purpose of the import of the capital goods.

- b. To further secure the financial facilities the parties signed various documents wherein R1 mortgaged the resort property measuring 49,974 sq. meters and all the fixed and current assets of R1.
 - c. R1 utilized the financial facilities but was irregular in maintaining financial discipline and in servicing the said debt. Thus, the Applicant declared the account of R1 as non-performing asset (“NPA”) in this regard on 30.09.2015 and recalled the advance granted to R1 vide recall letter dated 04.11.2015. Recall letter was again issued on 09.03.2017.
3. The respondents have filed a reply and written submissions in which the following grounds are raised:
 - a. The Tribunal does not have territorial jurisdiction as jurisdiction will lie with the court which has jurisdiction over the mortgaged property, which in the present case is situated in Agra.
 - b. The application has not been filed by a person authorized to do so on behalf of the Applicant. No board resolution or authorisation letter has been annexed with the application. The board resolution filed afterwards by the Applicant is dated 16.12.2017 and the authority

letter is dated 04.06.2018. Thus, both the documents are dated after filing of the application on 12.12.2017

4. Thus, two issues emerge for adjudication of the present application:
 - a. Whether this Tribunal has the jurisdiction to entertain this application?
 - b. Whether the application has been filed by a duly authorised person?

5. The first issue is addressed by Section 60 of the Code, which states that “*the Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of a corporate person is located.*”

6. Thus, as the registered office of R1 is in Delhi, even according to its company master data, this Tribunal has jurisdiction to entertain this application.

7. The second issue is addressed by referring to the stand taken by the Hon'ble National Company Law Appellate Tribunal in *Palogix Infrastructure Pvt. Ltd. vs. ICICI Bank Limited*:

"31. As per Section 7 of the 'I & B Code' an application for initiation of 'Corporate Insolvency Resolution Process' requires to be filed by 'Financial Creditor' itself. The form and manner in which an application under section 7 of the 'I & B Code' is to be filed by a 'Financial Creditor' is provided in 'Form-1' of the Adjudicating Authority Rules. Upon perusal of the Adjudicating Authority Rules and Form-1, it may be duly noted that the 'I & B Code' and the Adjudicating Authority Rules recognize that a 'Financial Creditor' being a juristic person can only act through an "Authorised Representative". Entry 5 & 6 (Part I) of Form No. 1 mandates the 'Financial Creditor' to submit "name and address of the person authorised to submit application on its behalf. The authorization letter is to be enclosed. The signature block of the aforementioned Form 1 also provides for the authorised person's detail is to be inserted and also includes inter alia the position of the authorised person in relation to the 'Financial Creditor'. Thus, it is clear that only an "authorised person" as distinct from "Power

of Attorney Holder" can make an application under section 7 and required to state his position in relation to "Financial Creditor".

32. The 'I & B Code' is a complete Code by itself. The provision of the Power of Attorney Act, 1882 cannot override the specific provision of a statute which requires that a particular act should be done by a person in the manner as prescribed thereunder.

33. Therefore, we hold that a 'Power of Attorney Holder' is not competent to file an application on behalf of a 'Financial Creditor' or 'Operational Creditor' or 'Corporate Applicant'.

38. This apart, if an officer, such as senior Manager of a Bank has been authorised to grant loan, for recovery of loan or to initiate a proceeding for 'Corporate Insolvency Resolution Process' against the person who have taken loan, in such case the 'Corporate Debtor' cannot plead that the officer has power to sanction loan, but such officer has no power to recover the loan amount or to initiate 'Corporate Insolvency Resolution Process', in spite of default of debt.

39. If a plea is taken by the authorised officer that he was authorised to sanction loan and had done so, the application under section 7 cannot be rejected on the ground that no separate specific authorization letter has been issued by the 'Financial Creditor' in favour of such officer designate."

8. In light of the above order, it is held that the present application filed by Shri R. P. Shankar, the assistant general manager in Oriental Bank of Commerce is maintainable as it has been filed by an authorized person.

9. It is also further clarified that the respondents in their reply have claimed that the Applicant is coercing R1 into repaying the amount and that R1 is ready to pay the amount under a restructuring agreement. R1 claims that it had submitted the restructuring proposal to the Applicant but the Applicant did not consider the same. R1 also claims that it has been unable to repay the debt on time because of losses suffered by it due to bad market conditions in the tourism industry. Further, R1 also claims that the resort property is worth much more than the loan amount and the present step of the Applicant was disproportionate.

10. Thus, R1 in its submissions admits that the amount claimed by the Applicant is due to be paid by R1 but R1 is unable to repay it presently because of losses in its business. The resolution process under the Code has been instituted for the purpose of finding a way of resolving the company's problems and enable it to pay debts. Thus, the resolution process instead of being a coercive or disproportionate step as claimed by the respondents can in fact, be a process for reviving R1's business, with the cooperation of R1's creditors, including the Applicant.

5. The Financial Creditor has proposed Vikram Kumar, registered with Indian Institute of Professionals of ICAI having registration number IBBI/IPA-001/IP-P00082/2017-18/10178, (email: vikramau@gmail.com) as the interim resolution professional and a written communication in the format prescribed under Form 2 of the Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rules, 2016 has been filed by the proposed interim resolution professional. As a consequence of the application being admitted in terms of Section 7 of the Code moratorium as envisaged under the provisions of Section 14(1) and as extracted hereunder shall follow in relation to the Corporate Debtor:

(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 the possession of the corporate debtor.

However during the pendency of the moratorium period in terms of Section 14(2) and 14(3) as extracted hereunder:

(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.

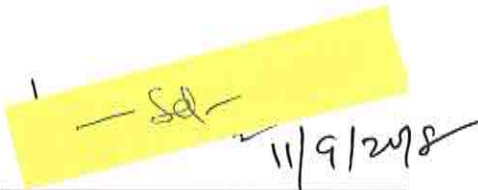
The duration of the period of moratorium shall be as provided in Section 14(4) of the Code and is reproduced below for ready reference:

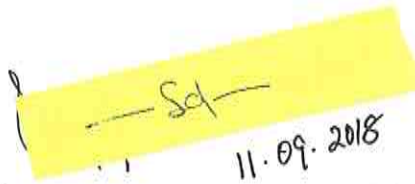
(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

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.

11. Based on the above terms, the Application stands admitted in terms of Section 7 of the Code and the moratorium shall come in to effect as of this date. A copy of the order shall be communicated to the Financial Creditor as well as to the Corporate Debtor above named by the Registry. In addition a copy of

the order shall also be forwarded to IBBI for its records. Further the IRP above named be also furnished with copy of this order forthwith by the Registry.


Dr. V.K. SUBBURAJ
MEMBER (TECHNICAL)


(R.VARADHARAJAN)
MEMBER(JUDICIAL)

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