

In the National Company Law Tribunal,
Kolkata Bench, Kolkata

Company Petition (IB) No.447/KB/2017

**Section 7(1) and other applicable provisions of the Insolvency and
Bankruptcy Code, 2016**

In the matter of:

Ketan Mehta

.... Applicant/Financial Creditor

Versus

ABNM Restaurant Pvt. Ltd.

.... Respondent Company/Corporate Debtor

Order Delivered on 8th November 2017

Coram:

V. P. Singh, Member (J)

Jinan K.R., Member (J)

For the Applicant/Financial Creditor : Mr. Kiran Sharma, Pr. C.S.

For the Respondent/Corporate Debtor : 1. Ms. Debaleena Ganguly, Advocate
2. Mr. Amit Kumar Muhuri, Advocate

ORDER

Per Jinan K.R., Member (J)

Mr. Ketan Mehta (Financial Creditor) filed this petition under section 7 (1) of the IBC, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rule, 2016 for corporate insolvency resolution process against the respondent M/s. ABNM Restaurant Private Ltd. (Corporate Debtor). Brief facts as construed from the perusal of the following records are the following:-

The corporate debtor has availed various credit facilities by way of financial assistance from the (Financial Creditor) Mr. Ketan Mehta. Mr. Ketan Mehta had granted credit facilities of an overall limit of Rs. 1,09, 22,999.00 (Rupees One Crore Nine Lakh Twenty-Two Thousand Nine Hundred Ninety-Nine only) an agreed amount of debt granted to the corporate debtor as per an executed Agreement between the Corporate Debtor and Financial Creditor dated 25.07.2016 marked and annexed as (Annexure-I, Ex-E; P.30). The various dates of disbursement which can be identified in the Bank Statement of the Financial Creditor marked and annexed as (Annexure-I, Exhibit-D; P.19). The total amount of debt/ amount claimed to be in default started from the month of January 2017 till July 2017 of Rs. 1,674,297 (Rupees Sixteen Lakh Seventy-Four Thousand Two Hundred Ninety-Seven Only) is shown in (Annexure-I, Ex-C, P.18). The corporate debtor failed to make timely payment of the installments in terms of agreed terms contained in the said agreement.

The corporate Debtor availing various credit facilities and the amount of default also has been executed by various documents duly annexed with which includes Bank Statement marked and annexed as (Annexure-I; Exhibit-D. P. 19); Copy of ledger accounts maintained in the books of the financial Creditor for the period 12.08.2010 to 31.03.2017 is marked and annexed as (Annexure-I; Exhibit-F, P.35-45) and copy of ledger account of the financial creditor in the books of corporate debtor for the period 01.04.2015 to 31.03.2016 is marked as (Annexure-I; Exhibit-G); P.46-48). A copy of demand notice dated 18th April 2017 via email to the corporate debtor demanding payment of the dues is marked and annexed as (Annexure-I; Exhibit-H, P. 49). A copy of notice to the corporate debtor is marked as (Annexure I; Exhibit I).

The petitioner further submits that the consent of the Interim Resolution Professional obtained by the petitioner and is produced in the petition. The written

communication of the same under Form-2 has been duly marked and annexed as ("Annexure-II", P.51).

Also, by power of attorney the petitioner has appointed the said Company secretary, Mr. Kiran Sharma to appear on the behalf of the Financial Creditor, copy of the said Memorandum of appearance under Form NCLT-12 marked and annexed in P. 54, 55. That, the petitioner prays for initiating corporate insolvency resolution process against the corporate debtor.

In reply to the contentions raised by the petitioner, the respondent – Corporate Debtor mainly raised the following contentions. The petition is not maintainable. The petitioner has no *locus standi* to file this application as the Financial Creditor failed to substantiate the status quo of the respondent company as Corporate Debtor as 'Corporate Person' without producing any constitutional document to validate the same.

Heard counsel on both sides. Perused the documents.

Upon hearing the arguments and considering the contentions taken by the parties the only one issue arises for consideration is whether this petition is not maintainable for want of constitutional documents substantiating that respondent is a corporate debtor?

This is an application for initiating corporate insolvency resolution process against the respondent under section 7 of the I&B Code, 2016. In an application filed under section 7 the requirements to be satisfied for admitting like the petition in hand is that the petitioner shall establish all the ingredients as provided under section 7 (5) of I&B, Code. The petitioner has filed this application under section 7 of the 'I&B Code' in Form-I of the 'Adjudicating Authority Rules' and enclosed the records in terms of said Rules and therefore, the Form was complete and that there is default in payment. What are the documents to be produced in an

application to be filed under section 7 of I&B, Code is discussed in detail by the Hon'ble NCALT in *"Neelkanth Township and Construction Pvt. Ltd. Vs. Urban Infrastructure Trustees Limited"* in *Company Appeal (AT) (Insolvency) No. 44 of 2017*? It is good to read para 16 of the said judgment. It read as follows: -

"16. 'Financial Creditor' along with the application required to be furnished information and other facts as prescribed under sub-section (3) of Section 7. Where the Adjudicating Authority is satisfied that a default has occurred and the application under sub-section (2) is complete, and there are no disciplinary proceedings pending against the proposed resolution professional, it can admit such application and in case the application is incomplete, required to provide 7 days' time to complete the record and on failure is to dismiss the application.

The Hon'ble NCALT in the above referred case also held that *"It is well settled that rules of procedure are to be construed not to frustrate or obstruct the process of adjudication under the substantive provisions of law"*

In the present case the Financial Creditor has in this application has enclosed Form 1 under Section 7 in Part -1 along with the list of particulars and the details attached therewith under Part -I,II,III, IV and V as and so required under Rule 4(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 .In support of the record of default the following particulars has been attached under Part-IV with serial nos. 1,2 and Under Part-V with serial nos. 7,8 enclosing the documents evidencing the list of defaults which are -

- i. Banks statements of Financial Creditor evidencing the loan amount granted by Financial Creditor to the Corporate Debtor;
- ii. Copy of the agreement entered between the corporate debtor and the Financial Creditor dated 25.07.2016.

- iii. Copies of Ledger accounts showing the existence of Financial Debt, the amount and the date of default, along with demand notice both in e-mail and written marked and annexed as (Annexures-I, Exhibit -E, F, G, H, I).

Thus, all the requirement for initiating a corporate insolvency proceeding s against the respondent is compiled by the petitioner in this case

At this juncture learned Counsel for the respondent cited M/s Jeevan Credit & Leasing Pvt. Ltd. V. M/s King Airways Limited (Company application No. (I.B) 13/PB/2017) a judgment delivered by Hon'ble NCLT, Principal Bench for highlighting an argument that for want of constitutional document as provided under section 5 (4) of I&B, Code this petition is liable to be dismissed. It is significant to note that the statement of account not at all challenged by the learned counsel for the respondent. Learned counsel for the respondent also submits that due to inability to pay the debt the respondent could not discharge the debt.

The fact in the above cited case is entirely different with that of the fact in the case in hand. In this case petitioner showed details of the respondent in the Form-1. On a perusal of the document annexed in Form -1 under the No-II, wherein as against Serial No.2 (Identification Number of the Corporate Debtor is U55101WB1999PTC090068) along with the date of incorporation on 13th August 1999 with a nominal share capital of Rs. 85,00,000.00 (Rupees Eighty-Five Lac) and Paid-up Share capital of Rs. 84,72,010.00 (Rupees Eighty-Four Lac Seventy-Two Thousand and Ten). Based on these details mentioned under Part-II, there is no question of doubt that the corporate debtor is a 'corporate person'. Respondent company admittedly is a going concern. Corporate person identity is not at all challenged in this case. Only challenge is that since constitutional documents not

produced it is not maintainable applying the principle laid down in the above cited judgment.

On a reading of the above cited judgment what is understood is that the document relayed upon for proving the identity that is MOU is incomplete and Hon'ble Principal Bench even doubted the bona fide of filing like petition and found non-production of Board Resolution. The genuineness of the loan transaction in the said case also doubted and the Hon'ble NCLT rejected the application observing that *"Finally the IBC by section 65 clothes this Tribunal with authority to impose a fine exceeding up to Rs. One Crore for fraudulent and malicious initiation of proceedings and hence the parties and professionals are required to be vigilant, careful and bonafide in approaching this Tribunal under IBC."*

The fact in the case in hand being different than the above referred case and petitioner being succeeded in proving that the respondent is a corporate debtor come under the definition of Section 3(8) of I&B, Code and that the petition is otherwise complete we find the petition filed under section 7 of I&B Code is perfectly maintainable.

Bear in in mind the principle laid down in the NCALT judgment referred above, we are satisfied that petitioner succeeded in proving the compliance of all requirement on its side and established default in repayment of the debt by the respondent.

Thus, the next question is whether the proposed insolvency professional name can be considered for the appointment as per section 7(5) (a) of I&B, Code? Here in this case the petitioner proposed the name of insolvency professional Shri Bhimal Agarwal, Chartered Accountant and produced written communication from the proposed IRP in Form 2 as per sub rule (1) of Rule 9 of the Insolvency

and Bankruptcy (Application to Adjudication Authority) Rules, 2016. Form 2 is produced along with the petition and marked as Annexure II. The learned Insolvency professional certifies that there are no disciplinary proceedings pending against him with the Board or ICAI Insolvency Professional Agency. Thus, herein this case requirement under section 7(5) (a) in its entirety is also satisfied by the petitioner.

Taking into consideration of all the above we are inclined to admit this petition under section 7 of I&B, Code. Being found this petition is liable to be admitted we hereby appoint the insolvency professional Shri Bhimal Agarwal as interim resolution professional. Accordingly, we hereby admit this petition for initiating insolvency resolution process and declaring moratorium for the purposes referred to in section 14 of the I&B Code with following directions:

(i) That subject to provisions of sub sections (1) of section 14 of the Code, hereby prohibits the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, Tribunal arbitration panel or other authority; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; 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 and the recovery of any property by an owner or lessor where such property is occupied by or in the 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 moratorium period.

(iii) That 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.

(iv) That the order of moratorium shall have effect from the date of admission of this petition till the completion of the corporate insolvency resolution process as prescribed under section 12 of the Code.

(v) That we hereby direct to cause public announcement of the corporate insolvency resolution process immediately as specified under section 15 of the Code.

(viii) That, moratorium is declared for the purposes referred to under 14 of the IBC Code.

Having admitted the petition, we hereby pronounce the commencement of the corporate insolvency resolution process effective from the date of this order.

Issue certified copy of the order Urgent Photostat certified copies of this Order, if applied for, be supplied to parties upon compliance of all requisite formalities.


Vijai Pratap Singh,
Member (J)


Jinan K.R.
Member (J)

Signed on 8th November 2017