

**In the National Company Law Tribunal,  
Kolkata Bench, Kolkata**

**CP (IB) No.349/KB/2017**

In the matter of:

Ramswarup Industries Ltd.

.....Corporate Applicant/ Corporate Debtor

-Versus-

ICICI Bank Ltd.

.....Applicant Bank/Financial Creditor

Order Delivered on 21st August 2017

**Coram:**

**Vijai Pratap Singh, Member (J)**

For the Petitioner : Mr. S. C. Pathak, Advocate

For the Respondent : 1. Mr. Ratnako Banerji, Advocate  
2. Mr. Siddhartha Datta, Advocate  
3. Ms. Sukani Divedi, Advocate

For the Financial Institute : 1. Arvind Jhunjunwala, Advocate  
2. Debargha Basu, Advocate

**ORDER**

This is an application filed by the corporate applicant for initiating Corporate Insolvency Resolution Process under Sec.10 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred to I & B Code, 2016) read with Rule 7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Corporate applicant is Ramswarup Industries Ltd. whose identification No. is L65993WB1979PLC032113 and Shri Ashish Jhunjunwala, Managing Director has filed this application on behalf of the corporate applicant on the basis of board resolution dated 18/5/2017 whereby Shri Ashish Jhunjunwala, Managing Director of the company has been authorized to file necessary application under the provisions of Insolvency and Bankruptcy Code, 2016. A copy of the Board Resolution dated 18/5/2017 is annexed with the application as Annexure 5.

2. Corporate applicant has also proposed the name of Nilesh Sharma as Interim Resolution Professional (nilesh.sharma@irrip.com) and also given his details at Part II page 5 of the application.

3. Corporate applicant has filed this application on the basis of default in payment to financial creditors and relevant details of financial creditor whereby default has occurred have been annexed in Annexure 6, page 137A to 137O which shows the total amount of default Rs.3,379.77 crore and outstanding amount is Rs.2,047.70 crore. The chart shows that this default committed on account of loan taken by the corporate applicant from different banks. The details of corporate facilities from different financial creditors are also given from Annexure 7 to 35, pages 138 to 166 of the application. The petitioner has also annexed the document evidencing the existence of debt such as sanction/renewal letter/loan agreement which is Annexure 37 to 64 pages 248 to 393. The petitioner has also annexed a copy of notice along with the correspondence with various assets reconstruction companies, details are annexed as Annexure 37C to 40C, 42C, 43C, 49C, 50C, 52C, 53C, 54C and 66.

4. The petitioner has also annexed the documents evidencing default in payment to the financial creditor which are Annexure 37A, 38A, 39A, 40A, 41A, 42A, 43A, 44A, 45A, 46a, 47A, 48A, 49A, 50A, 51A, 52A, 53A, 54A, 55A, 56A, 57A, 58A, 59A, 60A, 61A, 62A, 63A, 64A, 65A, 50D, 67, 69, 70 and 71. All these documents are relating to the notice issued under Adjudicating Authority Rules by different financial institutions under SARFAESI Act.

5. The petitioner has also annexed a copy of ledger account of the financial creditor in the books of the corporate debtor. These are annexed as Annexure 37B, 38B, 40B, 41B, 42B, 43B, 45B, 46B, 47B, 48B, 52B, 54B, 56B, 60B, 62B, 63B, 64B and 65B.



6. It is also mentioned in the application that Shri Nilesh Sharma, proposed IRP is fully qualified and permitted to act as an IRP. The petitioner has further stated that as per government notification Sec.4(b) of Sick Industrial Companies (Special Provisions) Repeal Act, 2003 as amended by Sec.252 read with Eighth Schedule of Insolvency and Bankruptcy Code, 2016 a company in respect of which any appeal or reference or inquiry pending before AAIFR or BIFR was abated, may make reference to the NCLT under the I & B Code, 2016 within 180 days from commencement of I & B Code, without fees in accordance with the provisions of I & B Code. A copy of the last BIFR order dated 24/11/2016 is enclosed as Annexure 71 and this petition has been filed on 25/5/2017.

7. ICICI Bank Ltd. as the financial creditor has filed the objection against the application alleging that the applicant has filed this application under Sec.10 of the I & B Code to initiate corporate insolvency process fraudulently and with malicious intent for the purposes other than for the resolution of insolvency. ICICI Bank has further submitted corporate applicant including its promoters have initiated the instant proceedings with an intention to thwart the various lenders including the applicant bank from realizing their securities with the sole motive of obtaining a moratorium and displacing all their assets including their secured assets from the clutches of law.

8. It has been further alleged that the conduct of the corporate applicant and its directors is indicative of a mala fide intent and the corporate applicant should not be permitted to take advantage of the protective realms offered by the Code in order to abuse the process of law and to stop bonafide recovery actions which after significant effort, time and expense have culminated to advanced stages. The said application is liable to be rejected.

9. ICICI Bank has also alleged that on account of continued financial stress, the corporate applicant made a reference for Corporate Debt Restructuring (CDR) in

November 2010 which was subsequently admitted in December 2010. Pursuant to the same, the applicant bank approved a bilateral Debt Restructuring thereby restructuring of the existing credit facilities were made by Debt Restructuring Agreement dated 2/2/2011. The final proposal for restructuring by the corporate applicant was rejected by CDR EG in December 2011. It has been further reported that total outstanding amount of the ICICI Bank on the corporate applicant is Rs.36.03 crore and ICICI Bank has the first charge over the movable and immovable fixed assets of the corporate applicant situated at Shyam Nagar pertaining to Ramswarup Utpadak Division. Details of security pledged in favor of ICICI Bank are given in the objection.

10. It is also alleged that the bank has demanded payment Rs.31.2 crore from the corporate applicant on 27/1/2013 but the corporate applicant failed to pay the dues payable by it to the applicant bank. Therefore, vide notice dated 26/2/2013 the Bank invoked the personal guarantee furnished by Ashish Jhunjhunwala in favor of ICICI Bank. On account of such invocation and development of the aforementioned bank guarantee, the applicant bank in furtherance to its recall notice dated 28/1/2013, further demanded repayment of all dues payable by the corporate applicant to the applicant bank including the aforementioned bank guarantee vide notice dated 15/1/2014.

11. It is also stated in the objection that the applicant bank has taken all possible steps available to it under law including steps under the SARFAESI Act and Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

12. It has been further alleged by ICICI Bank that the default is a creation and result of fraud and siphoning off funds. The corporate applicant is not a going concern and hence effectively no resolution plan under the Code can be arrived at. Further, the corporate applicant has made no effort to repay its outstanding amount or to honor its



commitments even after the restructuring of facilities by the applicant bank. The corporate applicant has been declared as a non-performing asset by various nationalized and private banks including the applicant bank. The corporate applicant and its directors are facing a criminal investigation on account of allegations relating to cheating and defrauding. The conduct of the directors of the corporate applicant does not show that they intend to repay the debts of the bank. On the above basis, ICICI Bank has submitted that the application moved by the corporate applicant be rejected.

13. Heard Ld. Counsel for the parties and perused the record. On perusal of the record it appears that as per Government Notification dated 28/5/2016 whereby Sick Industrial Companies [SICA] (Special Provision) Repeal Act, 2003 as amended by Sec.252 read with 8th Schedule of the Insolvency and Bankruptcy Code 2016, a company in respect of which any appeal or reference or enquiry pending before BIFR or AAIFR was authorized by the Sick Industrial Companies(Special Provision)Repeal Act that such company may make a reference to the NCLT under the I & B Code 2016 in accordance with the provisions of the I & B Code.

14. The above notification was issued on 28/5/2016. Therefore, from 28/5/2016 any company whose reference was pending before SICA was authorized to file reference to the NCLT under I & B Code, 2016. Relevant provision of the Act, for ready reference, is given below:-

#### THE EIGHTH SCHEDULE

Amendment to the Sick Industrial Companies (Special Provisions) Repeal Act, 2003 (1 of 2004)

In Section 4, for sub-clause (b), the following sub-clause shall be substituted, namely—

"(b) On such date as may be notified by the Central Government in this behalf, any appeal preferred to the Appellate Authority or any reference made or inquiry pending to or before the Board or any proceeding of whatever nature pending before the Appellate

Authority or the Board under the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) shall stand abated:

Provided that a company in respect of which such appeal or reference or inquiry stands abated under this clause may make reference to the National Company Law Tribunal under the Insolvency and Bankruptcy Code, 2016 within one hundred and eighty days from the commencement of the Insolvency and Bankruptcy Code, 2016 in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016:

Provided further that no fees shall be payable for making such reference under Insolvency and Bankruptcy Code, 2016 by a company whose appeal or reference or inquiry stands abated under this clause."

15. Applicant has filed the reference under subrule (1) of rule 7 of Adjudicating Authority Rules 2016 and application have been submitted in Form 6 as prescribed in Adjudicating Authority Rules 2016. Relevant provision of the rule, for ready reference, is given below:-

Rule 7. Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

7. Application by corporate applicant.— (1) A corporate applicant shall make an application for initiating the corporate insolvency resolution process against a corporate debtor under section 10 of the Code in Form 6, accompanied with documents and records required therein and as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

(2) The applicant under sub rule (1) shall dispatch forthwith, a copy of the application filed with the Adjudicating Authority, by registered post or speed post to the registered office of the corporate debtor.

16. On perusal of the above rule, it is clear that corporate applicant may make an application for initiating corporate insolvency process against the corporate debtor under Sec.10 of the I & B Code 2016 in Form 6 accompanied with documents and records required therein. The proviso of the above rule prescribes that application under (2) of the Adjudicating Authority Rules shall dispatch forthwith, a copy of the application



filed with the Adjudicating Authority, by registered post or speed post to the registered office of the corporate debtor.

17. It is important to mention that Rule 7 of the Adjudicating Authority Rules, 2016 is applicable for that corporate applicant who wants to initiate corporate insolvency process against a corporate debtor. It is pertinent to mention that corporate applicant is defined in Sec.5 sub-rule (5) of I & B Code, 2016 which is given below for ready reference:-

Sec 5 (5) Insolvency and Bankruptcy Code 2016

"corporate applicant" means—

- (a) corporate debtor; or
- (b) a member or partner of the corporate debtor who is authorized to make an application for the corporate insolvency resolution process under the constitutional document of the corporate debtor; or
- (c) an individual who is in charge of managing the operations and resources of the corporate debtor; or
- (d) a person who has the control and supervision over the financial affairs of the corporate debtor;

18. On perusal of the definition of corporate applicant provided in Sec 5(5) of I&B Code, it appears that corporate applicant may be corporate debtor or a partner of the corporate debtor who is authorized to make an application for the corporate Debtor for initiation of corporate insolvency resolution process or individual who is managing affairs of corporate debtor or a person who has the control and supervision over the financial affairs of the corporate debtor. This clearly indicates that corporate applicant can only be either a corporate debtor itself or any person who is authorized on behalf of the corporate debtor to file an application for initiation of corporate insolvency resolution process. Whereas sub-clause (2) of Rule 7 provides to dispatch the copy of the application forthwith on the registered address of the corporate debtor. It is also important to mention that application under Sec.10 of I & B Code is to be initiated by

the corporate applicant who can either be a corporate debtor or any person who has control over his affairs or by a person who is authorized by a corporate debtor. It is important to mention that application under Sec.10 of the I & B Code is to be initiated by the corporate applicant who is representing Corporate Debtor. It is necessary to read the provision of Sec.10 of I & B Code which is given below:-

Insolvency and Bankruptcy Code, 2016

Section 10. Initiation of corporate insolvency resolution process by corporate applicant

1) Where a corporate debtor has committed a default, a corporate applicant thereof may file an application for initiating corporate insolvency resolution process with the Adjudicating Authority.

(2) The application under sub-section (1) shall be filed in such form, containing such particulars and in such manner and accompanied by such fee as may be prescribed.

(3) The corporate applicant shall, along with the application furnish the information relating to—

(a) its books of account and such other documents relating to such period as may be specified; and

(b) the resolution professional proposed to be appointed as an interim resolution professional.

(4) The Adjudicating Authority shall, within a period of fourteen days of the receipt of the application, by an order—

(a) admit the application, if it is complete; or

(b) reject the application, if it is incomplete:

Provided that Adjudicating Authority shall, before rejecting an application, give a notice to the applicant to rectify the defects in his application within seven days from the date of receipt of such notice from the Adjudicating Authority.

(5) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (4) of this section.



19. Sec.10 of I & B Code, 2016 specifically provides the provision for initiating corporate insolvency process by corporate applicant and as per Rule 7 of the Adjudicating Authority Rules, after filing the application the corporate applicant has to send the copy of the application through registered post on the corporate debtor. The definition of corporate applicant is given in the Act which means any person who is either a corporate debtor or person authorized by the corporate debtor. But, it cannot be a corporate creditor. Therefore, it is clear that though rules provide that after filing the application before the Adjudicating Authority applicant is to dispatch the copy of the application to the corporate debtor, even though the application could only be moved by the corporate debtor itself or a person authorized by the corporate debtor. It requires some consideration because when an application has been moved by the same person then there is no rationality of sending the copy of application, which may serve the purpose of notice, through registered post or speed post on itself.

20. It is also pertinent to mention that as per the definition of Corporate Applicant as provided in I & B Code, the Corporate applicant may be a Corporate Debtor or a person representing itself. Natural justice requires to issue notices under the Act on the opposite party and in the case of corporate Debtor, it can be either financial creditor or operational creditor whereas Rules provide for sending a copy of the application through registered post on the corporate debtor.

It is pertinent to mention that Hon'ble NCLAT in the case of ICICI Bank vs. Innoventive Industries Ltd. has held that Sec.424 of the Companies Act, 2013 is applicable to the proceedings under the I & B Code, 2016. It is mandatory for the Adjudicating Authority to follow the principles of natural justice while passing an order under I & B Code 2016. Hon'ble NCLAT has further given direction that requirement is to adhere to the principles of natural justice and the fact that the principles of natural

justice are not ousted by the court can be found from Sec.7 (4) of the I & B Code 2016 and rule 4 of the Adjudicating Authority Rules 2016. Rule 4 deals with an application made by a financial creditor under Sec.7 of the I & B Code 2016. Sub-rule (3) of rule 4 requires such financial creditor to dispatch an application filed with the Adjudicating Authority by registered post or speed post to the registered office of the corporate debtor. Hon'ble NCLAT has further held as under:

"The insolvency resolution process under Section 7 or Section 9 of I&B Code, 2016 have serious civil consequences not only on the corporate debtor - company but also on its directors and shareholders in view of the fact that once the application under Sections 7 or 9 of the I&B Code, 2016 is admitted it is followed by appointment of an 'interim resolution professional' to manage the affairs of the corporate debtor, instant removal of the board of directors and moratorium for a period of 180 days. For the said reason also the Adjudicating Authority is bound to issue limited notice to the corporate debtor before admitting a case under section 7 and 9 of the 'I & B Code', 2016.---

Section 7 of the Code provides for the process of initiation of corporate Insolvency Resolution process by a financial creditor, Section 8 and 9 provide for the process of initiation of Insolvency Resolution process by an operational creditor and Section 10 of the Code provides for process of initiation of Insolvency Resolution process by the corporate debtor itself."

21. Hon'ble NCLAT has given specific direction that adjudicating authority is bound to issue a limited notice to the corporate debtor before admitting a case under Sec.7 and 9 of the I & B Code 2016. Hon'ble NCLAT has discussed that Sec.7 and 9 of the I & B Code have serious civil consequence not only on the corporate debtor but also on its directors and shareholders. In view of the fact that once the application under Sec.7 or 9 is admitted, interim resolution professional gets the power to manage the affairs of the corporate debtor. Hon'ble NCLAT has further held under Sec.10 process is initiated by corporate debtor itself. So the direction of issuing notice is given only for applications filed under Sec.7 and 9.



22. It is true that under Sec.10 of the I & B Code process is initiated by corporate debtor itself but there may be a situation where a reference under SICA after abatement by statutory implication comes to NCLT and is registered as an application under I&B Code. As per provision of SICA Repealing Act, all the pending references on the date of notification stand abated and power has been given to the applicant to make a reference before the NCLT under I & B Code. In reference, corporate creditors and corporate debtors both had the right to contest the reference, whereas in NCLT if the order is passed without providing an opportunity of hearing to the creditors then far reaching consequences may be there.

23. In the case in hand, the application has been moved by corporate debtor itself under Sec.10 of the I & B Code 2016 and as per the details were given by the corporate debtor in the application, it reveals that corporate debtor has debt liability of about Rs.3,379.77 crore. The corporate debtor has given a chart which shows the amount of default is Rs.3,379.77 crore of about 41 banks and details of all the lenders are given in Annexure 6 from pages 137A to 137O.

24. It is also important to mention that ICICI Bank who happens to be one of the creditors has filed an objection and has stated in the objection that corporate applicant has filed this application with fraudulent intent of exploiting the moratorium provisions under the I & B Code and application has been filed with mala fide intent and ICICI Bank made a request that corporate applicant should not be permitted to take advantage of the protective realms offered by the Code in order to abuse the process of law and to stop bona fide recovery actions which, after significant effort, time and expense, have culminated to advance stage. It is also mentioned in the objection that corporate applicant made a reference for Corporate Debt Restructuring (CDR) in

November 2010. Finally, the proposal for restructuring by the corporate applicant was rejected by CDR EG in December 2011.

25. ICICI Bank has stated in the objection that with a view to affecting recovery of the substantial sum of money advanced to the corporate applicant and owned to the applicant bank, which has taken all possible steps available to it under the law including SARFAESI Act, 2002 and RDDBFI Act, 1993. It is also stated in the objection, that corporate applicant had filed a reference before BIFR in November 2012 on the ground that more than 75% of secured creditors had already taken possession of the secured immovable properties under the provisions of SARFAESI Act. The said reference was dismissed by BIFR vide order dated 19/2/2014. A corporate applicant aggrieved by such order preferred an appeal before the AAIFR with a view to further stall the ongoing proceedings initiated by the secured financial creditors. It is also mentioned in the objection that Appellate Authority remanded the case back to BIFR vide order dated 3/12/2014 with a specific direction to consider the submission of all the parties and pass an order afresh after giving specific findings through a reasoned order.

26. Above mentioned reference was pending before BIFR which was abated on account of coming into effect of SICA Repealing Act and by virtue of that corporate applicant i.e. Corporate Debtor was given authority to file reference before NCLT under I & B Code and in compliance with that the applicant has filed this petition under Sec.10 of the I & B Code.

27. It is pertinent to mention that there are more than 41 banking and financial institutions whose outstanding dues, as per statement, about Rs.3,379.77 crore and the argument has been advanced on behalf of corporate applicant that ICICI Bank has exposure of Rs.36.03 crore, which happens to be approximately less than 0.93% of the



total outstanding amount. Therefore, the objection of ICICI Bank should not be taken into consideration and application under section 10 should be admitted.

28. It appears from the record that in reference No.67/2012, BIFR has passed an order on 24/11/2016, wherein it is mentioned that Hon'ble AAIFR vide its order dated 3/12/2014 has remanded the matter back to the BIFR with direction to consider the submission of all the parties and to pass order a fresh giving a specific finding through a reasoned order as to whether PNB along with all other secured creditors on whose behalf it has taken under Sec.13 (4) of the SARFAESI Act indeed constitute more than 75% of outstanding debt or not. Accordingly, the BIFR passed an order to PNB to file an affidavit in support of their claim that they constitute more than 75% of the charge on secured assets of the company as on date along with supporting documents. After the above order, the proceeding before the BIFR abated by the SICA Repealing Act and the corporate applicant has filed this application before NCLT.

29. In the application filed by the corporate applicant under I & B Code, the applicant has not given the details of Financial Creditors/Operational Creditors in Part III of Form 6 of application which was required to be given.

In the case in hand, the applicant has filed this application under Sec.10 of the I & B Code is in nature of reference which was pending before BIFR and abated on account of coming into effect of SICA Repealing Act. It is also pertinent to mention that in BIFR, all the banks were represented and total exposure of all the creditors as stated in the application is Rs.3799.77 crore and ICICI Bank has filed an objection which has exposure of less than 1% of total outstanding amount. But principles of natural justice requires opportunity of hearing to all the creditors. The principles which were relied upon by the Hon'ble NCLAT in the case of ICICI Bank vs. Innoventive Industries Ltd. also applies in this case. It is also pertinent to mention that though clause (2) rule 7 of

the Adjudicating Authority Rules, 2016 provides the provision of sending notice to corporate debtor even though application itself can only be moved either by corporate debtor or person authorized by the corporate debtor or by a person representing corporate debtor. Clause (2) of the above Rules requires reconsideration by the Appropriate Authority and it appears that instead of the corporate debtor, the copy of the application which may serve the purpose of notice, ought to be given to the corporate creditors.

30. It is also pertinent to mention that when a reference which has been abated on account of SICA Repealing Act which was being contested by all the secured creditors, which has been filed in NCLT is also in nature of reference wherein all the secured creditors had representation, the principle of natural justice requires that opportunity of hearing should be given to all the secured creditors who were represented in the earlier reference before the BIFR or AAIFR.

### **ORDER**

For the reasons aforesaid I direct the corporate applicant to implead Central Government through the Secretary, Ministry of Corporate Affairs as respondent along with all the secured creditors who were represented in Reference before BIFR.

Let notice be issued to the respondents. It is expected that Secretary, Ministry of Corporate Affairs will personally go through the matter as it is of great importance and to take appropriate action.

Registrar, NCLT, is directed to communicate a copy of this order to the Secretary, Ministry of Corporate Affairs, Govt. of India, A Wing, 5th Floor, Shastri Bhawan, New Delhi – 110 001 through e mail and also by Speed Post.

Further direction is being issued to the corporate applicant to complete the application in proper format in Form 6 and give the detail name and address of all the



financial/corporate creditors in Column No.1 and 2 of Part III of Form 6 as provided in Adjudicating Authority Rules.

In the interest of justice corporate applicant is further directed to issue notice on all the financial/corporate creditors through registered/speed post or by hand and file affidavit of service within seven days thereof.

List the matter on 31st August 2017.

sd/-

**Vijai Pratap Singh,**  
**Member (J)**

Signed on 21st August 2017