

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

Coram: Vijai Pratap Singh, Member (J)

CP (IB) No.371/KB/2017

In the matter of:

State Bank of IndiaFinancial Creditor/Applicant

-Versus-

Orissa Manganese & Minerals Ltd.Corporate Debtor/Respondent

For the Petitioner:

1. Mr. Siddhartha Datta, Advocate
2. Ms. Suhani Dwivedi, Advocate,
3. Ms. Prapa Ganguly, Advocate

For the Respondent:

1. Mr. Ratnanko Banerjee, Advocate
2. Mr. Sidhartha Sharma, Advocate
3. Ms. Swapna Chowbey, Advocate
4. Ms. Namrata Basu, Advocate
5. Mr. N. Sengupta, Advocate

Order/Judgment

(Delivered on 3rd August 2017)

The Applicant/Financial Creditor, State Bank of India (SBI) has filed an application under Sec.7 of the Insolvency and Bankruptcy Code, 2016 (IBC, 2016) read with Rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 against Orissa Manganese & Minerals, a corporate debtor.

2. The brief facts of the case, as stated in the application, are that State Bank of India through a Gazette notification dated 22/2/2017 has acquired by way of amalgamation, the business including the assets and liabilities of State Bank of

Hyderabad, State Bank of Mysore, State Bank of Patiala and State Bank of Travancore. Shri Partha Sen, Assistant General Manager and Relationship Manager, State Bank of India has filed this application on behalf of SBI on the basis of authorization letter dated 16/6/2017 annexed with the application at page 61 as Annexure B.

3. The Corporate Debtor Orissa Manganese & Minerals Ltd., Identification No. is U13201OR1953PLC017027. The registration number of the proposed interim resolution professional is Mr. Sumit Binani, Registration No. IBBI/IPA/16-17/01 of 2A, Ganesh Chandra Avenue, Commerce House, Room No.6, 4th Floor, Kolkata – 700 013, email irp.adhunikgroup@gmail.com.

4. The applicant has stated that he has granted various loans to Orissa Manganese and Minerals Ltd. (OMML) and pursuant to the provisions of the Master Restructuring Agreement dated 30/3/2015 and Supplemental Master Restructuring Agreement dated 26/6/2015 and also Common Loan Agreement dated 21/3/2014 entered into, inter alia, the Corporate Debtor has taken up obligations as a Co-Obligor/Co-Borrower to such loans disbursed by the applicant to AML. The AML defaulted on the loans disbursed by the applicant. Upon such default, the applicant's right to proceed against the corporate debtor for repayment of the loans disbursed to them. As per clause 3.1(d) of the Master Restructuring Agreement dated 30/3/2015 in case of failure/default by the borrower to pay any amount due and payable by it under any corporate debtor, then the other borrowers shall be liable as a co-obligor and the lenders shall have the right to proceed against the other borrowers, which is annexed with the petition as Annexure F. In relation to the said MRA Supplemental M R A has also been executed on 26/06/15 which is annexed with petition as Annexure G

5. As per clause 6.15.5 of the Common Loan Agreement which provides that the borrowers agree and undertake that their respective available cash flows may be utilized to service any shortfall in the cash flows of any other borrower

in any fiscal year in relation to servicing such other borrower's repayment obligation under the financing documents which is annexed with the petition as Annexure S.

6. As per Annexure D annexed with the petition Rs.9, 404,806,298.63 is the total outstanding on the account as on 31/5/2017.

7. The petitioner annexed to the petition as Annexure E copies of statement of accounts certified according to Bankers Books of Evidence Act, 1891. The petitioner has also filed copies of balance confirmation letter issued in relation to the loans granted to AML dated 31/3/2017 annexed as Annexure FF along with minutes of meeting of the JLF for AML, OMML and Zion Steel Ltd. held on 12/6/2017 as Annexure MM.

8. The petitioner in his application at Part V page 9 has described the particulars of security documents for the loan granted to AML, who is the corporate debtor.

9. The petitioner has also proposed the name of Mr. Sumit Binani, Registration No.IBBI/IPA/16-17/01 of 2A, Ganesh Chandra Avenue, Commerce House, Room No.6, 4th Floor, Kolkata – 700 013, email irp.adhunikgroup@gmail.com. to act as interim resolution professional whose details are mentioned above. The petition has been verified by Mr. Partha Sen, Assistant General Manager & Relationship Manager, State Bank of India. The petitioner has stated that he has been authorized on the basis of power of attorney given to him. The petitioner has filed power of attorney of State Bank of India in favour of Mr. Partha Sen. It is also mentioned in the said power of attorney that "I hereby authorized all officers on whom signing powers have been conferred vide Notification dated 27/3/1987 to sign applications, reply, affidavit, counter affidavit, sur rejoinder and generally all pleadings and file applications for initiation of Corporate Insolvency Resolution Process before the

National Company Law Tribunal, under the provisions of Insolvency and Bankruptcy Code, 2016 on behalf of the Bank."

10. The petitioner has also filed Master Restructuring Agreement, which is Annexure F and also Supplemental Master Restructuring Agreement Annexure G along with the petition, which shows that several Banks have lended money to the corporate debtor out of which SBI's lending is Rs. 9,404,806,298.63 in respect of Common Loan Agreement and Master Restructuring Agreement with the corporate debtor. It appears that other banks have also lended money to the corporate debtor details of which are mentioned in the MRA Annexure F.

11. The corporate debtor has filed objection mainly on the ground that no specific power of attorney has been granted by the applicant SBI for initiation of corporate insolvency process. The corporate debtor has stated that the petition has been verified by Shri Partha Sen on the basis of a Power of Attorney executed by Ms. Arundhati Bhattacharya, Chairman, SBI on 16/6/2017 which does not reflect any specific person on whom authority to initiate proceeding under the Code or to delegate the power have been mentioned. It is a vague Power of Attorney and no authority can be conferred or any specific person to initiate proceeding under the Code.

12. The corporate debtor has raised objection that the application filed by the financial creditor in violation of the guidelines of the Reserve Bank of India with gross suppression of material facts.

13. The corporate debtor submitted that JLF meetings were held from time to time on 26/10/2016, 6/1/2017, 22/3/2017, 12/6/2017 and 23/6/2017 to discuss the viability of the financial affairs of the corporate debtor.

14. The corporate debtor has also stated that the merger/amalgamation of Zion Steel Ltd., Adhunik Mettalic and Orissa Manganese Minerals Ltd. is still pending with Hon'ble High Court at Orissa, Cuttack and as per the notification

issued by the Ministry of Corporate Affairs all the company cases were to be transferred to National Company Law Tribunal from 15/12/2016 and, as such, the proceeding was transferred to the NCLT. Due to writ petition filed by the High Court Bar Association of Cuttack before the Hon'ble Division Bench, High Court Orissa, Cuttack, an interim order was passed staying transfer of all cases to NCLT, Kolkata till the case was heard. The interim order passed by the Hon'ble High Court is still subsisting and the case is pending for final adjudication. Till the merger application is decided by the Hon'ble High Court, Orissa, Cuttack, the corporate debtor prayed for stay of the instant proceedings.

15. The corporate debtor further submitted that the meeting of the JLF was called to discuss for withdrawing the existing merger application wherein the corporate debtor was directed to submit revised resolution proposal before the next meeting. In terms of the guidelines of the Reserve Bank of India recovery action is to be initiated only if the process of restructuring is found not feasible. In the present proceeding the applicant has not taken permission from JLF to initiate proceeding under Sec.7 of the Code and in absence of such JLF permission the applicant has no right to take any step under Sec.7 of the Code.

16. The corporate debtor has stated that the financial exposure of the applicant is only Rs.891, 75, 66,146.28 being 34.24 percentage of the total credit facility of the respondent. The total outstanding dues alleged by the applicant in the said application is about Rs.940, 48, 06,298.63. As against this, as per the averments made by the applicant in the application, the estimated value of the security pledged and mortgage to the lender as on 30/3/2017 is over Rs.3,887,75,16,407/- . As such the financial exposure of the applicant is less than the estimated value of the security furnished by the respondent.

17. The last audited balance sheet of the respondent shows that it has substantial assets and the properties i.e. mines, high value equipment's and the other diverse properties. Further, the sum of Rs.559, 42, 73,126/- is receivable

by the respondent from its debtors. In such circumstances, the question of any insolvency or bankruptcy or any presumption thereof in relation to the respondent cannot arise.

18. The corporate debtor has substantial assets and property but due to unforeseen and unavoidable circumstances the respondent underwent financial crunch. The respondent had regularly made payment till June 2016. The respondent suffered immensely financially and otherwise due to the reasons of cancellation of coal blocks by the orders of Hon'ble Supreme Court; non-grant of iron ore mines by Orissa Govt. despite commitment made by them; Saha Commission stopped iron ore mines from last 4 years and, as such, raw material price shoot up by 100%; dumping of steel from China; highest bank interest cost; raw material (coke) price increased at alarming rate from last five years; power tariff and electricity duty on CPP increased by 100%; tariff agreed to be provided by Orissa Govt. through licensee below Rs.2/- per unit and as on that day the rate is Rs.5.60 and minimum wages increased from 3 to 4 times.

19. The corporate debtor has further stated that his exposure is only 34.24% of the total credit facility of the respondent. It would appear from a perusal of the particulars of security as stated by the applicant that the applicant has first ranking equitable mortgage over the fixed assets of the company and also of the OMM and AML. In such scenario the applicant is not entitled to seek recourse under 7 of the IB Code.

20. The corporate debtor has further stated the financial accommodation obtained by the respondent from the applicant has still not been recalled by the applicant. The applicant has also not issued any notice of demand calling upon the respondent to repay the amount allegedly defaulted by the respondent in service of any notice recalling the loan or any demand being raised. The corporate debtor has further stated that the account of the respondent could not have been classified as Non-Performing Assets.

21. The corporate debtor further submitted that the financial exposure of the applicant is only Rs.891, 75,146.28 being 34.24% of total credit facility of the respondent. The total outstanding dues alleged by the applicant is only Rs.9, 404,806,298.63. The Bank claimed interest of Rs.48, 72, 40,152.35 which is not shown in the monthly bank statement provided to company.

22. It is further stated that even as per averments made by the applicant in the application, the estimated value of the securities pledged and mortgaged to the lenders as on 31/5/2017 is over Rs.3,887,75,16,407/- . In such circumstances, the respondent cannot be treated as bankrupt or insolvent company.

23. It is further stated that though the applicant was obliged to disburse Rs.56, 11, 00,000/- but wrongfully and illegally refused to disburse the balance amount of Rs.31, 89, 00,000/- . The respondent has further stated that the financial creditor cannot take any recourse to the mechanism provided under Sec.7 of the Code without taking any permission from the JLF as mandated by guidelines of the Reserve Bank of India MRA. The applicant while seeking to take recourse of Sec.7 of the Code had breached the terms and conditions of MRA and the guideline issued by the Reserve Bank of India.

24. The debts of the respondent are already under the discussion for restructuring by the JLF as the last meeting of the JLF held on 23/7/2017 and is still in discussion and in absence of concurrence of all the lenders the corporate debtor cannot take recourse of the mechanism provided under Sec.7 of the Code.

25. The corporate debtor has further stated that the account of the respondent could not have been classified as Non-Performing Assets.

26. Heard Ld. Counsels for the parties and perused the record. The financial creditor, State Bank of India has filed this application under Sec.7 of the Code

on the basis of the default committed by Orissa Manganese & Minerals Ltd. The outstanding exposure (with the principal amount, accrued interest and penal interest) as on 31/5/2017 with respect to various facilities Rs.9, 404,806,298.63. The applicant has filed Gazette Notification dated 22/2/2017 marked Annexure/A which is relating to amalgamation of associate banks of State Bank of Hyderabad, State Bank of Mysore, State Bank of Patiala and State Bank of Travancore into State Bank of India. The petitioner has also filed copy of authorization letter, Annexure B which shows that Chairman of State Bank of India has authorized of those officers on whom signing powers have been conferred vide Notification dated 27/3/1987 to sign applications, reply, affidavit, counter affidavit, sur rejoinder and generally all pleadings and file applications for initiation of Corporate Insolvency Resolution Process before the National Company Law Tribunal under the provisions of Insolvency and Bankruptcy Code, 2016 on behalf of the Bank. The applicant has also annexed Gazette Notification dated 2/5/1987 which shows that All Officers in the Grade of SMGS-IV and above are authorized to sign all documents, instruments, accounts, receipts, letter and advices, etc. connected with the current or authorized business of the Bank in respect of all matters coming in discharge of functions of the posts held for the time being. Copy of the Gazette Notification is attached with the application as Annexure/C.

27. The petition has been signed and verified by Shri Partha Sen, Assistant General Manager and Relationship Manager of State Bank of India. The petitioner has stated that Shri Partha Sen was authorized to sign on behalf of State Bank of India by notification dated 27/3/1987 and further by the Chairman, State Bank of India authorization letter dated 16/6/2017. Shri Sen was further authorized for initiating Corporate Insolvency Resolution Process for signing and verifying the petition on behalf of the SBI. Therefore, it is a fact that Shri Partha Sen, AGM is an officer in the Grade of SMGS-IV and above. So, he was authorized to sign on behalf of State Bank of India by notification of State Bank of India dated 27/3/1987 and by the authority given by the Chairman, SBI dated

16/6/2017. He has further been authorized to initiate Corporate Insolvency Resolution Process.

28. The petitioner has given the details of facilities granted to Orissa Manganese & Minerals Ltd. and outstanding amount in a Chart Form which is Annexure/D at page 78 of the petition which shows details of all the account number wherein facility was extended, type of facility, limit, date of disbursement, date of default, default amount as on 31/5/2017, principal outstanding amount as on 31/5/2017, accrued interest till 31/5/2017 and total outstanding on the account as on 31/5/2017. On the basis of this Chart, it appears that total outstanding principal along with interest as on 31/5/2017 was Rs.9, 404,806,298.63.

29. The respondent, corporate debtor has mentioned in his reply that the outstanding dues as alleged by the applicant is Rs.9, 404,806,298.63. The applicant has claimed interest Rs.48, 72, 40,152.35 which is not shown in the monthly bank statement provided to company. As against this, even as per averments made by the applicant in the application the estimated value of the security pledged are marked to the lender as on 31/5/2017 is over Rs.3,887,75,16,407/- In the circumstances, the respondent claims that he cannot be treated as bankrupt or insolvent company.

30. The respondent on the basis of above statement is not disputing regarding total outstanding figure given by the petitioner but respondent's main contention is that the securities pledged to the lender is over Rs.3,887,75,16,407/. In the circumstances, proceeding for insolvency should not be initiated. There is no specific denial regarding the total outstanding amount due on the corporate debtor.

31. The petitioner's statement regarding due amount is fully supported by statement of account is certified as per Banker's Books of Evidence Act, submitted along with the petition Annexure/E, Master Restructuring Agreement,

Annexure/F, Letter of approval from CDR Cell dated 20/3/2015 Annexure/H, Inter Creditor Agreement dated 20/7/2015 Annexure/I, Hypothecation Agreement dated 4/7/2016 Annexure Y, Working Capital Consortium dated 20/2/2014 Annexure Z, Common Loan Agreement dated 21/3/2014 Annexure AA, Inter-se Agreement dated 20/2/2014 Annexure/BB, CIBIL Report dated 29/6/2017 Annexure/LL, Balance Confirmation Letter dated 31/3/2017 Annexure MM, Minutes of JLF dated 12/6/2017 Annexure/NN.

32. It also appears from the record that total outstanding due on the corporate debtor on 31/5/2017 was Rs.9, 404,806,298.63. On the basis of record it is also clear that corporate debtor has committed default in making payment on 1/11/2015 and thereafter regularly committing default in making payment till date. So, the financial creditor has claimed total outstanding principal amount Rs.891,75,66,146.28, interest accrued till 31/5/2017 Rs.48,72,40,152.35 and total amount comes to Rs.9,404,806,298.63 which the corporate debtor failed to pay. Therefore, the financial creditor has filed an application under Sec.7 of the Code for initiation a corporate resolution process.

33. The main objection of the corporate debtor is that the petition has been filed without considering the fact that meeting of JLF was duly held from time to time on 26/10/2016, 6/1/2017, 22/3/2017, 12/6/2017 and 23/6/2017 to discuss the viability of the financial affairs of the company and in the meeting of the JLF held on 23/6/2017. There is no clear mandate on exit proposal from corporate debtor package.

34. Regarding the above objection it is important to point out that in case of Innoventive Industries Ltd. vs. ICICI Bank & Anr. the Hon'ble NCLAT has laid down that "in so far as Master Restructuring Agreement dated 8th September 2014 is concerned, the appellant cannot take advantage of the same. Even if it is presumed that fresh agreement came into existence, it does not absolve the appellant from paying the previous debts which are due to financial creditor.

.....for initiation of corporate resolution process by financial creditor under sub Sec.(4) of Sec.7 of Insolvency and Bankruptcy Code, 2016 the adjudicating authority on receipt of the application under sub Sec. (2) is required to ascertain existence of the default from the records of information utility or on the basis of other evidence furnished, the financial creditor under sub-section (3), under sub-section (5) of Sec.7 adjudicating authority is required to satisfy where a default has occurred, whether an application is complete and whether any disciplinary proceeding against the proposed Insolvency Resolution Process. Once it is satisfied it is required to admit the case..... Beyond the aforesaid practice the adjudicating authority is not required to look into any other factor including the question whether permission or consent of JLF has been obtained from one or other authority, including the JLF. Therefore, the contention of the petitioner that the respondent has not obtained permission or consent of JLF to the present proceeding which will be adversely affect loan of other members cannot be accepted and fit to be adjudicated.”

35. On the basis of the law laid down by the Hon'ble NCLAT, it is clear that the financial creditor was fully authorized to file a petition irrespective of the fact of decision taken by Joint Lenders Forum and financial creditor's right will not be affected by the decision of JLF or MRA.

36. Therefore on the basis of the case law laid down by the Hon'ble NCLAT, it is clear that the corporate debtor's objection raised by the financial creditor is not sustainable.

37. The corporate debtor has also raised an issue that amalgamation/merger of Zion Steel Ltd., Adhunik Metaliks and Orissa Manganese and Minerals Ltd. is still pending before the Hon'ble High Court at Cuttack and as per Govt. notification this petition shall be transferred to NCLT. But, due to interim order passed by the Orissa High Court the said petition having been transferred to NCLT and such interim order is still subsisting and merger application is still

pending before the Hon'ble High Court. Therefore, the petition is not maintainable. The above objection is not sustainable in law.

38. The financial creditor has separate right under Insolvency & Bankruptcy Code, 2016 which will not be affected on the basis of pending merger proceeding before Hon'ble Orissa High Court.

39. The corporate debtor has further raised an issue that respondent has substantial assets and properties and due to unforeseen and unavoidable circumstances the respondent underwent financial crunch. The respondent had regularly made payment till June 2016. The respondent suffered immensely financially and otherwise due to cancellation of coal blocks by the orders of Hon'ble Supreme Court; non-grant of iron ore mines by Orissa Govt. despite commitment made by them; Saha Commission stopped iron ore mines from last 4 years and, as such, raw material price shoot up by 100%; dumping of steel from China; highest bank interest cost; raw material (coke) price increased at alarming rate from last five years; power tariff and electricity duty on CPP increased by 100%; tariff agreed to be provided by Orissa Govt. through licensee below Rs.2/- per unit and as on that day the rate is Rs.5.60 and minimum wages increased from 3 to 4 times. The respondent contended that the above facts are responsible which was unforeseen to the respondent and, therefore, the respondent underwent financial crunch. Whatever may be circumstances which led the corporate debtor into financial crunch that cannot be a consideration for rejecting the insolvency petition.

40. In this case the financial creditor has fully proved that corporate debtor has committed default in making payment of Rs.9, 404,806,298.63 and the above information is also proved by the CIBIL report filed by the petitioner.

41. The Financial creditor has also proposed the name of Mr. Sumit Binani, Registration No.IBBI/IPA/16-17/01 of 2A, Ganesh Chandra Avenue, Commerce House, Room No.6, 4th Floor, Kolkata – 700 013, email

irp.adhunikgroup@gmail.com. to act as interim resolution professional whose details are mentioned above. As per record no disciplinary proceeding is pending against him. Therefore, he also deserves to be appointed as Interim Resolution Professional.

42. Therefore the petition filed by State Bank of India, applicant herein deserves to be admitted.

ORDER

The petition filed by the financial creditor under Sec.7 of the Insolvency & Bankruptcy Code, 2016 is hereby admitted for initiating the Corporate Resolution Process and declare a moratorium and public announcement as stated in Sec.13 and 15 of the IBC, 2016.

Moratorium is declared for the purposes referred to in Sec.14 of the Insolvency & Bankruptcy Code, 2016. The IRP shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Sec.15. The public announcement referred to in clause (b) of sub-section (1) of Sec.15 Insolvency & Bankruptcy Code, 2016 shall be made immediately.

Moratorium under Sec.14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:

- 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 (54 of 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.

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.

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 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 Sec.31 or passes an order for liquidation of corporate debtor under Sec.33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

Necessary public announcement as per Sec.15 of the IBC, 2016 may be made.

Mr. Sumit Binani, Registration No.IBBI/IPA/16-17/01 of 2A, Ganesh Chandra Avenue, Commerce House, Room No.6, 4th Floor, Kolkata – 700 013, email irp.adhunikgroup@gmail.com. is appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan.

The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors.

Certified copy of the order may immediately be issued to the Financial Creditor, Corporate Debtor and IRP.

List the matter on 18th August for submission of progress report by IRP.

Sd/-

Vijai Pratap Singh,
Member (J)

Signed on 3rd August 2017