

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

Coram: Vijai Pratap Singh, Member (J)

CP (IB) No.373/KB/2017

In the matter of:

State Bank of IndiaFinancial Creditor/Applicant
-Versus-	
Adhunik Metaliks Ltd.Corporate Debtor/Respondent

For the Petitioner:	1. Mr. Siddhartha Datta, Advocate
	2. Ms. Prapa Ganguly, Advocate

For the Respondent:	1. Mr. Ratnanko Banerjee, Advocate
	2. Mr. Sidhartha Sharma, Advocate
	3. Mrs. Priyanka Tibrewal, Advocate
	4. Ms. Namrata Basu, 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 Adhunik Metaliks Ltd., 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 Bikaner & Jaipur, 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 62 as Annexure B .

3. The Corporate Debtor Adhunik Metaliks Ltd., Identification No. is L28110OR2001PLC017271. 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 Adhunik Metaliks Ltd. (AML) and pursuant to the provisions of the Master Restructuring Agreement dated 30/3/2015 and the 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. Date of disbursement of all facilities granted to AML mentioned in Annexure D at page 80 of the petition which indicates that the petitioner has disbursed total facility of Rs.7, 477,200,000.00 and the total outstanding exposure with the principal amount, accrued interest and penal interest comes to Rs.8, 122,283,769.02 as on 31/5/2017, which is the total default amount of AML.

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 GG.

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 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 and OMML 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 GG.

10. 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.adhunigroup@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."

11. The petitioner has also filed Master Restructuring Agreement, which is Annexure F and Supplemental Master Restructuring Agreement, which is 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.7, 477,200,000.00 in respect of Common Loan Agreement and Master Restructuring Agreement with AML. It appears that other banks have also lended money to the corporate debtor details of which are mentioned in the MRA Annexure F.

12. 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.

13. 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.

14. 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.

15. 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 shall be transferred to National Company Law Tribunal from 15/12/2016 and, as such, the proceedings 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.

16. 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.

17. 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.

18. The corporate debtor further submitted that the applicant exposure is only 30.48 percentage of the total credit facility and the applicant has first ranking equitable mortgage over the fixed assets of the Company and the corporate debtor, OMM Ltd. and Zion Steel Ltd. as such, the applicant is not entitled to seek order under Sec.7 of the Code or can pray for an Interim Resolution Professional.

19. 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.

20. 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.

21. 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.

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

23. Heard Ld. Counsel for the parties and perused the record.

24. It appears from the record that the petitioner SBI has filed the petition under Sec.7 of the Insolvency & Bankruptcy Code, 2016 on the basis of Common Loan Agreement dated 21/3/2014 which was executed by Orissa Manganese & Minerals Ltd. as borrower no.1 and co-obligor no.1, Adhunik Metaliks Ltd. as borrower no.2 and co-obligor no.2 and Zion Steel Ltd. as borrower no.3 and co-obligor no.3 altogether as common borrower and everyone has taken the responsibility as borrower and co-obligor for the alleged loan. The above common loan agreement was executed between the borrower and lender. Clause 6.15.5 of the Common Loan Agreement indicates 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 and the borrower further agree and undertake to do all acts, deeds, matters and things as may be required by the lenders in relation to such shortfall.

25. On the basis of above Common Loan Agreement executed amongst Orissa Manganese & Minerals Ltd. (borrower no.1 and co-obligor no.1), Adhunik Metaliks Ltd. (borrower no.2 and co-obligor no.2) and Zion Steel Ltd. (borrower no.3 and co-obligor no.3) and State Bank of India (lender). In the agreement it is mentioned borrower no.1, borrower no.2 and borrower no.3 will collectively referred as borrowers and co-obligors. It also appears from the Common Loan Agreement, a term loan facility aggregating to Rs.1042.68 crore (facility A) was to be granted to borrower no.1, term loan facility aggregating to Rs.1064.82 crore

(facility B) to be granted to borrower no.2 and term loan facility aggregating to Rs.21.29 crore (facility C) was to be granted to borrower no.3.

26. It is also from the common loan agreement that borrower no.1, 2 and 3 commonly known as borrowers had taken the responsibility to repay the loan as co-obligor under the financing documents and the borrower further agree and undertake to do all acts, deeds, matters and things as may be required by the lender in relation to such shortfall. On the basis of the above Common Loan Agreement, Orissa Manganese & Minerals Ltd., Adhunik Metaliks Ltd. and Zion Steel Ltd. all three as borrowers were borrower and co-obligor of the loan amount given to any of them.

27. The petitioner has filed the details of outstanding amount in Chart Form which is Annexure D, which shows that outstanding loan amount on AML on 31/5/2017 was Rs.812,22,83,769.02. This amount includes the principal amount along with interest, details of which accrued interest and total outstanding is given in Annexure D.

28. The petitioner has also filed the demand notice issued by State Bank of India. It is specifically mentioned in the demand notice that pursuant to Common Loan Agreement and Master Restructuring Agreement in the event of default has occurred and continued without cause pursuant to clause 16. Default has been described in the notice, OMML has not paid its due amount of Rs.940, 48, 06,298.63 in respect of repayment installment/interest/default interest as per Common Loan Agreement and Master Restructuring Agreement. On account of failure by OMML in the due payments under the Common Loan Agreement and Master Restructuring Agreement, an event of default under Clause I of Clause 16.1 (payment) of the common loan agreement, clause 6.1(a) default in payment of principal sum of the restructured facilities and 6.1(b) default in payment of interest as occurred. It is also mentioned in the notice AML has not paid its due amount. On account of failure by AML in due payment, default has occurred.

Petitioner has also mentioned as per Clause 6.1.3 (b) Master Restructuring Agreement in the event of failure on the default on the part of any borrower to pay any amount due and payable by it under the CDR document, the other borrowers are liable to pay as co-obligor and, therefore, the lender has the right in addition and without prejudice to its right to the security to proceed against or enforce any other rights or security or claim payment from the other borrowers. The petitioner has also annexed the details of facilities granted to OMML and AML and their outstanding amount.

29. The petitioner has also attached the track report of Indian Post which shows that the abovementioned notices were received by the borrower on 27/6/2017. The petitioner has also filed certified copy of statement of account relating to different facilities given to the borrower. These are from pages 81 to 169 of the petition. The petitioner has also attached the certificate under Sec.2 (A) of the Bankers Books of Evidence Act, 1891 to certify the statement of account annexed with the petition. Therefore, statement of account clearly proves the averments in the application regarding the different facilities granted in favour of the borrower and the outstanding dues against the borrower in different account.

30. The petitioner has also annexed the Master Restructuring Agreement which is Annexure G which shows that it was executed between AML, OMML, Zeon Steel Ltd. and State Bank of India. This agreement contents signature of each of the borrower in the capacity of borrower and co-obligor. On the basis of the document filed by the petitioner it is clear, default has been committed by the OMML of Rs.940, 48, 06,298.63 and AML of Rs.812, 22, 83,769.02 and in spite of sending the notice, borrower has not paid the amount. The respondent corporate debtor's responsibility regarding the above loan is as co-obligor. On the basis of documents filed by the financial creditor, it is clear that corporate debtor has committed default in making payment of outstanding amount of debt and, therefore, the financial creditor has filed the application under Sec.7 of the

Code for initiating corporate insolvency resolution process. It also appears that the application files for restructuring of corporate insolvency process as complete. So, the petition deserves to be admitted. Financial creditor has proposed the name of Mr. Sumit Binani as IRP who is competent to work as IRP. As per declaration filed IRP Mr. Sumit Binani no disciplinary proceeding is pending against him. Therefore, Mr. Sumit Binani to be appointed as Interim Resolution Professional.

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.

Mr. Sumit Binani has submitted his consent in Form 2 under Rule 9 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

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

Let the copy of the order be sent to the Applicant/Financial Creditor as well as Corporate Debtor and IRP.

List the matter on 18th August, 2017

Sd/-
Vijai Pratap Singh,
Member (J)

Signed on 3rd August 2017