

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

CP (IB) No.363/KB/2017

In the matter of:

Punjab National BankFinancial Creditor/Applicant

-Versus-

Divyajyoti Sponge Iron Pvt. Ltd.Corporate Debtor/Respondent

Order Delivered on 23rd August 2017

Coram: Vijai Pratap Singh, Member (J)

For the Petitioner: Mr. Ranajit Chowdhury, Advocate

For the Respondent: Mr. Anirban Majumdar, Advocate

ORDER

The Applicant Punjab National Bank (PNB) has filed an application under Sec.7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as I & B Code, 2016) read with Rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 against Divyajyoti Sponge Iron Pvt. Ltd., a debtor.

2. The brief facts of the case, as stated in the application, are that Punjab National Bank is a corporate body constituted under the Banking Companies Act, 1956, Identification No. is AAACP0165G. Shri Achyut Banerjee has filed this application on behalf of PNB on the basis of authorization letter dated 24/5/2017 annexed with the application at page 294.

3. The Corporate Debtor Divyajyoti Sponge Iron Pvt. Ltd., Identification No. is U27102WB2003PTC096337. The name and registration number of the proposed interim resolution professional are Mr. Arun Kumar Gupta, Registration No. is IBBI/IPA-001/IP-P00013/2016-2017/0037 of P-15, Bentick Street, Kolkata - 700 001.

4. The applicant has stated that he has granted certain term loan and working capital facilities to the corporate debtor from time to time which was re-structured on the terms and conditions set out under the Working Capital Consortium Agreement dated 29/12/2008 annexed with the application and marked C, entered into, inter alia, the Corporate Debtor, PNB and certain other lenders (collectively JLF) as amended by a Joint Agreements of Guarantee & Corporate both dated 29/12/2008, Inter Creditors Agreement dated 29/12/2008. Copies of the Working Capital Consortium Agreement dated 29/12/2008 annexed with the application and marked C, Joint Deed of Hypothecation dated 29/12/2008 annexed with the application and marked D, Common Loan Agreement dated 29/12/2008 annexed with the application and marked E, Joint Deed of Hypothecation for Term Loan annexed with the application and marked F, Letter of Undertaking annexed with the application and marked G, Agreement of Guarantee of the Personal Guarantors as well as Corporate Guarantor dated 29/12/2008 annexed with the application and marked H and also Inter-Creditor Agreement dated 29/12/2008 annexed with the application and marked I.

5. Date of disbursement under the PNB Facilities mentioned in Part IV at page 4 of the petition which indicates that the applicant has disbursed Working Capital Cash Credit Account of Rs.7,00,00,000/- under various dates last being on 17/2/2012 and Term Loan Account of Rs.9,65,31,456/- during 2009 to 2011.

6. The petitioner has also given the details of the defaulted amount of Rs.29,33,65,793.94 along with the date of default relating to each of PNB facilities in a chart form, at page 7 of the petition, which indicates that the corporate debtor has defaulted on 30/6/2012 the above sum.

7. The petitioner has also filed copies of the statement of the bank account of the corporate debtor in respect of Cash Credit (Hypothecation) and Term Loan

Account, duly certified under the Banker Book Evidence Act, in support of its claim which is annexed to the petition as Annexure L and L/1 from page 248 to 268.

8. The account of the corporate debtor was declared as Non-Performing Asset by PNB on 30/6/2012 along with other lender and called up the advances and issued notices under Sec.13(2) of the SARFAESI Act, 2002. Copy of the notice issued by the applicant is annexed with the application as Annexure K at page 245.

9. The petitioner has also proposed the name of Mr. Arun Kumar Gupta, Registration No. is IBBI/IPA-001/IP-P00013/2016-2017/0037 of P-15, Bentick Street, Kolkata - 700 001 to act as interim resolution professional. The petition has been verified by Mr. Achyut Banerjee, Chief Manager, Punjab National Bank. The petitioner has stated that he has been authorized on the basis of Inter-Office letter dated 24/5/2017 issued by the Deputy Circle Head of the applicant bank. It is mentioned in the said Inter-Office letter that "I hereby authorized and permitted to initiate the proceeding under IBC in the A/c of M/s Divya Jyoti Sponge Iron Private Limited and do all the necessary identical act/s which includes signing of Plaint, Vakalatnama and all other necessary documents in this regard on behalf of the Bank."

10. The corporate debtor has filed objection mainly on the ground that the application does not contain any signature of the authorized person to act on behalf of the financial creditor. No authentic or authorized document has been filed to prove that the applicant is duly authorized and eligible to file the application under Sec.7 of the Code, 2016. The power of attorney is also defective. The corporate debtor has stated that while selecting the name of the resolution professional the financial creditor has not applied his due diligence.

11. The corporate debtor has raised the objection that enough documents are not annexed to prove in respect of the claim and also in support of the default. The statement of account is incorrect and misleading. The claim of default is misleading and contrary to Sec.3(1) of the Code, 2016.

12. The corporate debtor submitted that though debacles created by the financial creditor during the moratorium period, the corporate debtor have started its commercial production steadily.

13. The corporate debtor further submitted that the financial creditor being satisfied with the progress and viability of the corporate debtor had issued a zero percent tagging which is still in continuance appeared before this tribunal. Copy of the letter relating to zero percent tagging is annexed with the reply statement filed by the corporate debtor and marked as Annexure B/7.

14. Heard Ld. Counsel for the parties and perused the record. It appears from the record that corporate debtor has committed default in making payment of Rs.29,33,65,793.94 and the account of the corporate debtor was declared as non-performing assets by Punjab National Bank on 30/6/2012.

15. In support of the claim, the petitioner has filed the copy of loan sanctioned letter dated 19/6/2008 Annexure A (page 13A to 17); copy of resolution of the corporate debtor dated 1/12/2008 and 26/12/2008 Annexure B; copy of bank statement which are Annexure L, L-1 which have been certified under Banker Book Evidence Act. The petitioner has also filed the copy of reply letter of the corporate debtor dated 6/3/2017 along with reply of the corporate financial creditor dated 30/3/2017 Annexure M-1. The above letter shows that corporate debtor in reply to the notice received under I & B Code, 2016 has informed to the financial creditor "that after long discussion and based on the reports after the thorough inspection by PNBISL and MSME had issued that the business conducted by my client is very much viable. That thereafter a proposal of restructuring was also submitted to your concern which was duly accepted and

till date the confirmation of such proposal is pending before your esteemed good office."

It is further written in the reply that "It is also obvious to state that your notices dated 11/9/2013 and 19/2/2017 demanding the whole amount overlooking the matter of records is mala fide and arbitrary. The objective of the financial creditors governed by the Reserve Bank of India Rules and Regulations is to 'save companies, preserve business and improve returns' but your arbitrary and whimsical acts are completely against such rules and guidelines enshrined therein."

The corporate debtor has also stated "after declaring of the said loan account of the applicant as NPA. Consequently, the said notice is itself bad in the eye of law because of the unclassified debts as demanded by you."

16. In reply to the demand notice, the corporate debtor has mainly relied on the fact that proposal of restructuring was submitted and after inspection of PNBISL and MSME proposal of restructuring submitted to the bank and bank has not taken the decision. Ld. Counsel for the corporate debtor has also led emphasis on the fact that financial creditor has initiated a proceeding under Sec.13(2) of the SARFAESI Act and notice issued Annexure K (page 245 of the petition). So financial creditor cannot invoke the jurisdiction under I & B Code, 2016.

17. It appears from the record that the petition has been filed by the financial creditor on the basis of authorization letter issued by the bank which is annexed with the petition from page 287 to 295. It also appears from the record that PNB has given permission letter in favor of Shri Achyut Banerjee, Chief Manager whereby authority was given for initiating corporate resolution process against Divyajyoti Sponge Iron Pvt. Ltd. under I & B Code, 2016. The said authorization letter is certified by the Bank. Applicant has also annexed with the petition the authority letter dated 23/6/2017 given in favor of Advocate to appear, conduct

and argue the case which has been filed by the bank against Divyajyoti Sponge Iron Pvt. Ltd. in NCLT. Shri Achyut Banerjee who has been authorized by PNB for initiating corporate insolvency process has also authorized Advocate whose vakalatnama has been filed with the petition for making, conducting the case before NCLT.

18. The financial creditor has also attached the copy of the general power of attorney executed by PNB in favor of Shri Achyut Banerjee which is annexed with the petition from page 289 to 293. Thus, it is clear that Board of Directors of PNB has authorized Shri Achyut Banerjee as constituted attorney and after that PNB authorized Shri Achyut Banerjee for initiation of corporate insolvency process and Shri Achyut Banerjee was authorized by the Board of Directors of PNB who was appointed as Constituted Attorney of the bank with effect from 8/8/2006 and he was further authorized by the bank for initiation corporate insolvency process against the corporate debtor. Therefore, it is clear that Shri Achyut Banerjee who has filed this petition and verified was fully authorized to initiate corporate insolvency process against the corporate debtor, Divyajyoti Sponge Iron Pvt. Ltd.

19. It also appears from the record that in compliance of direction of Hon'ble NCLAT in the case of ICICI Bank vs. Innoventive Industries Ltd. notice was to be served on the corporate debtor on 14/7/2017 and affidavit along with a copy of notice has been filed by the applicant financial creditor and it is also pertinent to mention that corporate debtor was given opportunity to file reply and he has filed reply and after hearing at length order has been passed.

20. Petitioner's claim is fully supported by the bank statement which has been certified under Banker Book of Evidence Act. On the basis of the statement of account, it is clear that corporate debtor has committed default of Rs.29,33,65,793.94 up to 15/5/2017.

21. Ld. Counsel for the corporate debtor has mainly led emphasis on the fact that financial creditor had issued notice under Sec.13(2) of the SARFAESI Act on 11/9/2013 so it has no right to initiate a proceeding under I & B Code, 2016. The above objection is without any basis. Even after receiving the demand notice, the corporate debtor failed to make payment and thereby committed default.

22. It is pertinent to mention that in September 2013, I & B Code, 2016 was not in existence. Therefore, by issuing notice under Sec.13(2), it will not have any adverse effect on the petition. In Sec.11 of the I & B Code, it is specifically mentioned that no application for initiation of corporate insolvency process can be made against the corporate debtor who is inducting a corporate resolution process or corporate debtor having completed corporate insolvency resolution process 12 months preceding the date of making the application. The law has laid down the following conditions in Sec.11: -

11. The following persons shall not be entitled to make an application to initiate corporate insolvency resolution process under this Chapter, namely: —

(a) a corporate debtor undergoing a corporate insolvency resolution process; or

(b) a corporate debtor having completed corporate insolvency resolution process twelve months preceding the date of making of the application; or

(c) a corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application under this Chapter; or

(d) a corporate debtor in respect of whom a liquidation order has been made.

23. Therefore, it is clear that if a person has already given notice under SARFAESI Act, then there will be no bar for initiating corporate insolvency resolution process under I & B Code, 2016. It is also pertinent to mention that I & B Code, 2016 has the overriding effect over other laws and after the admission of the proceeding under I & B Code, 2016 other proceeding anywhere shall be

stayed as per the provision of moratorium u/s Sec.13 and 14 of the I & B Code. Therefore, by issuing a notice under Sec.13(2) of the SARFAESI Act, will not have any adverse effect on the competency of a petition filed by the applicant for initiation of corporate insolvency resolution process.

24. The financial creditor has proposed the name of Mr. Arun Kumar Gupta, who is competent to work as IRP. No disciplinary proceeding is pending against him. Therefore, he also deserves 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 of the IBC, 2016.

The 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 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 the 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. Arun Kumar Gupta, Registration No.IBBI/IPA-001/IP-P00013/2016-2017/0037 of P-15, Bentick Street, Kolkata – 700 001 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.

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

List the matter on 13/9 2017.

Sdf

Vijai Pratap Singh,
Member (J)

Signed on 23rd August 2017

ORDER