BEFORE THE NATIONAL COMPANY LAW TRIBUNAL MUMBAI BENCH, MUMBAI

C. P. NO. 247/I & BP/NCLT/MAH/2017

Coram: ***B.S.V. Prakash Kumar, Member (Judicial)***
V. Nallasenapathy, Member (Technical)

In the matter of u/s 7 of Insolvency and Bankruptcy Code, 2016 and Rule 4 of the I&B (Application to Adjudicating Authority), Rules 2016)

And

Indian Bank Ltd. .... Applicant/ Financial Creditor

vs.

Varun Resources Ltd. .... Corporate Debtor

Applicants' Counsel: Ms. Rathina Maravarman.

Corporate Debtor's Counsel: Mr. Sonu Kapadia.

ORDER
(Heard on 27.04.2017)
(Pronounced on 14.06.2017)

Per B.S.V. Prakash Kumar, Member (Judicial)

Indian Bank filed this Company Petition u/s 7 of The Insolvency and Bankruptcy Code, 2016 against a Corporate Debtor viz. Varun Resources Ltd. on the ground that this Corporate Debtor failed to repay ₹31,28,56,661 along with interest at the rate of 13% per annum and a monthly rest till the payment of the dues, claiming default date as 1.5.2014. In view thereof, this financial creditor filed this Financial Creditor application seeking initiation of Corporate Insolvency Resolution Process against the Corporate Debtor company.

Brief facts of the case:

2. This applicant submits that Varun Shipping Company Ltd (herein after called **Varun Shipping**) was primarily engaged in shipping business, in pursuance thereof, this company availed term loan of ₹50 crores, vide sanction letter dated 30.6.2010 from the applicant Bank by agreeing that

Varun Shipping would repay the loan in 16 quarterly instalments of ₹3,12,50,000 commencing after a moratorium period of 12 months. Apart from the document executed for sanctioning of this loan, Varun Shipping had also executed a statutory mortgage of their vessel "Maharishi Mahatreya" creating a second charge on the said vessel in favour of the applicant bank. And then Varun Shipping acknowledged its indebtedness as on 26.6.2013 to be of ₹28,99,63,706 towards the term loan of ₹50 crores, now it has become ₹31,28,56,661. Soon after Scheme of Arrangement of Amalgamation was approved by Hon'ble Bombay High Court vide order dated 19.3.2015, Varun Resources Ltd i.e., debtor company took over the shipping business of Varun Shipping as a resultant company and the former became the demerged company of such amalgamation with effect from the date of appointment, by which, all the assets and liabilities of Varun Shipping Company Ltd, including this liability, stood transferred to the Debtor Company. Since the company started defaulting making repayment, this account was classified in the Books of the Financial Creditor as NPA on 1.5.2014.

3. The applicant company further submits this Debtor Company, as per the data available on the MCA Website, has availed huge facilities from various other lender banks with an exposure of ₹3866,74,90,000.When this debtor company failed to make repayments, a joint lenders' forum was formed under the leadership of SBI with 12 banks as members, in the said consortium, when the lead Bank SBI while restructuring loans announced that the Applicant Bank had to follow them by infusion of another ₹6 crores into the Debtor Company, but this applicant Bank, not being agreeable to this proposal for further funding, since RBI had given an option to the member bank to exit provided a new lender or any of the exiting lenders took over the Applicant Bank's component, to safeguard the interest of it, the Bank tried to exit by transferring this loan to any of the consortium,

when that effort also failed to work, this Applicant has filed a suit of recovery before Debt Recovery Tribunal Mumbai under RRDBFI Act, 1993.

4. The applicant company further submits that this Debtor Company has repeatedly violated in meeting its commitments to the Banks, it has become so horrible that a cheque for ₹3.56 crores given by the debtor in favour of Indian Bank was bounced, for which, a criminal action was also taken against the directors of the Debtor Company under Negotiable Instruments Act, 1881. As this applicant is of the view that restructuring under JLF is not workable solution especially when the debtor company mismanaging its funds, it needs stronger restructuring plan under the Resolution Professional or needs to be wound up if such revival is not feasible.

5. The applicant has also filed minutes of the meetings held from the year 2014 to 2017 by the Financial Creditors under the leadership of State Bank of India, the minutes of the meetings clearly establishes that the Debtor Company committed irregularities inter alia by not operating their transactions through Trust Retention Account (TRA) as agreed upon in the document for restructuring. As per the agreed terms and conditions of Restructured Plan envisaged, the Corporate Debtor company has to operate their transactions only through TRA Account which would enable the Financial Creditors to appropriate their outstanding as per the terms and conditions of the MRA, but whereas, since August, 2016, the Debtor Company has stopped operating TRA Account and routing their transactions through another account.

6. Looking at all those allegations against the debtor company by the Financial Creditor, the Corporate Debtor raised the following **objections against prayer for admission of this Petition, which are as follows:**

1. The Corporate Debtor submits that a large number of shipping companies in India have been critically affected, in the case of the Corporate Debtor, Financial Institutions comprising vast majority of the total lending to the Corporate Debtor expressed their faith in the current management, the total exposure of the lenders supporting the Corporate Debtor is ₹2300 crores, the Creditors have formed the Joint Lender Forum and have approved the Corrective Action Plan (CAP) by signing the Masters' Restructuring Agreement (MRA) dated 31.3.2015. Pursuant to this, the Creditors have already infused an additional sum of ₹425crores into the company, simultaneously the promoters also pumped in additional ₹75crores as well. This is evident that CAP is progressing, because a sum of approximately ₹441crores has already been repaid to the lenders under the CAP.

2. The Debtor submits that the Creditor's debt is less than 1% of the total debt, in a situation like this, when an overwhelming majority of the Creditors further infusing funds to support restructuring through MRA, it ought to weigh on this Tribunal's mind and militate towards dismissal of the application filed by this minority creditor who stubbornly refuses to abide by the CAP despite having attended JLF meetings. In support of this submission, the Debtor Company relied upon ***Madhusudan Govardhandas vs. Madhu Woollen Industries Ltd (1971) 3 SCC 632and Tata Capital Finance Services vs. Unity Infra Projects Ltd. (High Court, Bombay, Arbitration Petition 800 of 2014 dated 6 July 2015).***

3. The Corporate Debtor Counsel further submits that since it has been stated in Section 7 (5) (a) that if the adjudicating authority is satisfied that default has occurred then **it may admit such application**, whereas under Section 9 (5) it has been categorically mentioned that the **Petition shall be admitted without any discretion to the**

Adjudicating Authority. When different yardsticks have been applied between Section 7 and Section 9 in admitting the Company petition, then this Bench ought to be cognisant of the variation in application of judicial discretion while admitting this Petition. The discretion given to the Adjudicating Authority u/s 7 is thus a safeguard vested with the Tribunal so that it does not have to mechanically admit all applications filed by the Financial Creditors. To say that whenever the word "may" is used, it has to be taken as directory not as mandatory, he relied upon ***Bachandevis Nagar Nigam, Gorakhpur (AR 2008) SCC 1282 and Mahalaxmi Rice Mills vs. State of UP (1988) 6 SCC 590.***

4. The Debtor Counsel further submits that this Tribunal should also bear in mind that the provisions u/s 433 of the Companies Act, 1956 also used the term "may" in respect of the company being wound up on inability to pay its debt leaving it open to the winding up court to apply its discretion while dealing with winding up petitions. To support this argument, the Counsel relied upon ***Dewan Brothers vs. Central Bank of India (1976) 3 SCC 800 and Sakal Deep Sahai Srivastava vs. Union of India (1974) 1 SCC 338.***

5. The Corporate Debtor Counsel further submits since this applicant has approached this Tribunal in contravention to RBI Circulars, this application is liable to be dismissed. Since it has been mentioned in RBI Circular dated 24.9.2015 that the dissenting lenders who do not want to participate in Corrective Action loan for revival of the company, such Bank has an option to exit by selling its exposure to a new or existing lenders within the prescribed timeline for implementation of the agreed CAP, if not such financial creditor is not able to exit by arranging a buyer within the above prescribed time, as per RBI Circular dated 25.2.2016, it has to necessarily adhere to the

agreed CAP and provide additional finance if the CAP so envisages for further funding. It has been further reiterated in a case in between ***IDBI Bank vs. Ruchi Soya Industries Ltd. (2017 SCC On Line Bom 153)*** holding that the circulars issued by RBI under Section 21 and 35 of Banking Regulation Act are statutory in nature and are required to be complied with by the Banks. To highlight the same point, he also referred Tata Capital Financial Services Supra.

6. The Debtor Counsel further submits if this application is admitted, it would derail CAP and also triggers financially disastrous consequences for the Corporate Debtor because this shipping industry is characterised by long charter parties and long credit periods for payments in respect of supplies provided to the vessels. The Counsel further submits that this applicant has already taken proceedings for enforcement of its debts against its secured asset, i.e. the vessel Maharishi Mahatreya. Moreover, the Debtor is liable to pay only ₹3crores to the first charge holder of this vessel, since the vessel has been valued for a sum of USD 4.4 million, this applicant can otherwise also realise its debt for its secured vessel is almost free from the first charge and the value of the vessel is more than the claim of the applicant herein.

7. In view of the objections raised above, the Corporate Debtor submits that this application is liable to be dismissed.

8. By going through the objections raised by the Corporate Debtor Counsel, it is ascertainable that this Corporate Debtor has not disputed on the debtor drawing down loan from the financial creditor, the default committed in making repayment of the loan, on the top of it, the debtor company has not even disputed on any of the documents filed by the

applicant except saying that the applicant failed to furnish the requisite information required u/s 7 of the Code, Rules and Regulations thereto.

9. What all the debtor company says is that this financial creditor petition is liable to be dismissed because JLF proceedings are already in progress after reconstruction of loans, this financial creditor loan is only one percent out of total NPA, when majority is in agreement to proceed with **Corrective Action Plan** to revive the company giving new life to it, the creditor having one percent should not have initiated this proceeding flouting the mandate envisaged in RBI guidelines directing dissenting Bank to exit from JLF by assigning its exposure to any of the Banks in Consortium or else to toe in the line of JLF set out by the majority of Consortium Banks. When RBI Guidelines armoured by statutory force, the same being reiterated in ***Ruchi Soya*** supra, this financial creditor has to either assign its exposure or to keep quiet and follow the majority who already supporting the company and when RBI says something to be done, it has statutory force, this Bank ought not to have proceeded before other forums transgressing the Laksmana Rekha drawn by RBI, last but not least, another objection is, in the case of financial creditor petition, it is not mandatory on this Adjudicating Authority to admit the petition just by seeing compliance made by the applicant as stated under sub section 3 of section 7 of the Code, because the same direction when given in the case of operational creditor, it is made compulsory by using the word "shall" under section of the same Code, therefore when statute itself used different yardsticks in admitting the petitions u/s 7 and u/s 9, this Adjudicating Authority should not admit when other surrounding facts outside the scope of subsection 3 of section 7, are supported by some other directions from other competent authority. Looking at the scope of the objections of the corporate debtor, at least this adjudicating Authority is relieved from deciding as to whether default in repayment is present or not, therefore existence of debt and default is not in dispute.

10. As to the objection raised by the Corporate Debtor stating that the corrective action plan being in force at the initiation by majority of the banks, this Financial Creditor, who has only 1% debt, should not have filed this case to stall the progress of Corrective Action Plan, this Bench has noticed that it is true the loan owed to the Financial Creditor is around 1% but the fact of the matter is the claim is more than ₹30crores and it is also a fact that this Company is already burdened with a debt of ₹2300crores, that apart no bank has come forward to own the loan liability of this Financial Creditor so as to provide exit from JLF. The Debtor Counsel has relied upon ***Madhusudan Govardhan Das vs. Madhu Wollen Industries Ltd and IDBI Bank Vs. Ruchi Soya Industries Ltd.*** to say that every bank of the consortium banks is bound by the JLF Agreement because JLF is supported by statutory force as stated in **Ruchi Soya** henceforth this Financial Creditor should not have filed this Petition floating the ratio already laid down by the Hon'ble High Court of Bombay. As to the ratio laid down in Ruchi Soya, the Hon'ble NCLAT has made it clear in para 82-84 of ***M/s. Innoventive Industries Ltd vs. ICICI Bank & Anr.*** as follows.

> ***"82. As discussed in the previous paragraphs, for initiation of corporate resolution process by financial creditor under sub-section (4) of Section 7 of the Code, 2016, the 'adjudicating authority' on receipt of application under sub-section (2) is required to ascertain existence of default from the records of Information Utility or on the 62 basis of other evidence furnished by the financial creditor under sub-section (3). Under Section 5 of Section 7, the 'adjudicating authority' is required to satisfy - (a) Whether a default has occurred; (b) Whether an application is complete; and (c) Whether any disciplinary proceeding is against the proposed Insolvency Resolution Professional.***

83. Once it is satisfied it is required to admit the case but in case the application is incomplete application, the financial creditor is to be granted seven days' time to complete the application. However, in a case where there is no default or defects cannot be rectified, or the record enclosed is misleading, the application has to be rejected.

84. Beyond the aforesaid practice, the 'adjudicating authority' is not required to look into any other factor, including the question whether permission or consent has been obtained from one or other authority, including the JLF. Therefore, the contention of the petition 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 rejected."

11. In view of the ratio laid down above, this Bench is of the view that the Adjudicating Authority is not required to look into any other scheme pending including JLF to proceed with Insolvency Proceedings therefore, the contention of the Corporate Debtor that this Financial Creditor has not obtained permission or consent of JLF will not have any bearing in respect to these proceedings therefore, this Bench has not found any force in the argument of the Corporate Debtor Counsel as to pendency of JLF in respect to the other loans taken by this Corporate Debtor.

12. As to other objection raised by the Corporate Debtor saying that the Debtor is only liable to pay ₹3crores to the first charge holder of this vessel upon which second charge has been made in favour of this Financial Creditor therefore this Financial Creditor is free to proceed against the vessel upon which the charge has been made to realise the loan claim as the vessel value is more than the due outstanding against the company, this argument cannot be taken as a criteria to decide this Petition because the Financial Creditor u/s 7 is free to proceed against the company when the

company is either unable to make repayment of loan or refuse to make repayment of loan therefore, in a company like this, where it is already burdened with a debt of more than ₹2300crores, it does not make any sense to dismiss this petition on the ground the Financial Creditor can realise its debt by invoking security. Moreover, this Bank already initiated proceedings before Debt Recovery Tribunal but so far there has been no progress in the said proceedings for realisation of the debt outstanding. Had this Corporate Debtor been ready and willing to clear the claim of this Bank, it would have done the same in the proceedings initiated before the Debt Recovery Tribunal. Notwithstanding the point above discussed, neither the Financial Creditor is under obligation to proceed invoking security before initiating this proceeding, nor is the Bench under obligation to withhold adjudicating this claim just because the security available is more than the claim made by the Financial Creditor therefore, this Bench does not find any merit in the argument of the Corporate Debtor.

13. As to the argument of the Corporate Debtor counsel stating that admission of the Company petition by this Bench is discretionary for the word "may" has been used while admitting the Company petition unlike in Section 9 petition where admission is mandatory for the word "shall" is used, on reading and comparing Section 7 and Section 9, merely by looking at replacement of the word "shall" with "may" cannot be construed as leverage to this Bench to dismiss the Petition when all the elements required to admit this petition have been complied with. Therefore, this Bench is of the view that discretion is to be used to admit the Petition rather than to dismiss the petition especially when there is ample proof of admission of availing loan and defaulting thereof. It is an established fact that this Company is already reeling under debt burden of more than ₹2300crores, therefore this Bench does not find any merit to dismiss this petition by looking at the word "may" under in Sub Section 5 of Section 7 of the Insolvency & Bankruptcy Code.

14. On perusal of the documents placed and the reasons given above, this Bench being satisfied that the debtor company defaulted in repaying its debt to the financial creditor, this Bench hereby admits this application prohibiting all of the following of item-I, namely: -

I (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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002(SARFAESI Act);

(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.

(II) That supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.

(III) That the provisions of sub-section (1) Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(IV) That the order of moratorium shall have effect from 13.06.2017 till completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.

(V) That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.

(VI) That this Bench hereby appoints, Mr. **Sanjeev Maheshwari, 3rd Floor, Vastu Darshan, Azad Lane, Andheri (East), Mumbai – 400 069**,Registration Number: IBBI/IPA-001/IP-00591/2016-17/2094, as an Interim Resolution Professional to carry the functions as mentioned under Insolvency & Bankruptcy Code.

15. Accordingly, this **CP 247/I & BP/NCLT/MAH/2017 is admitted.**

11. The Registry is hereby directed to communicate this order to the Financial Creditor and the Corporate Debtor within seven days from the date order is made available.

Sd/-
V. NALLASENAPATHY
Member (Technical)

Sd/-
B. S.V. PRAKASH KUMAR
Member (Judicial)