

**IN THE NATIONAL COMPANY LAW TRIBUNAL AT  
ALLAHABAD BENCH**

**CP NO.(IB)70/ALD/2017**

**&**

**CP NO.(IB)71/ALD/2017**

(UNDER SECTION 7 OF THE  
INSOLVENCY & BANKRUPTCY  
CODE, 2016 READ WITH RULE 4 OF  
THE INSOLVENCY & BANKRUPTCY  
[APPLICATION TO ADJUDICATING  
AUTHORITY] RULES, 2016)

**IN THE MATTER OF**

**BANK OF BARODA,**

A body corporate constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 and having its Head Office at Suraj Plaza-1, Sayaji Ganj, Mandavi, Baroda – 390 020 and Corporate Office at Baroda Corporate Centre, Bandra Kurla Complex, Bandra (East), Mumbai – 400 051 and acting through its International Business Branch, with its office at 17/14, The Mall, Kanpur, Uttar Pradesh – 208 001, India.

..... **APPLICANT/FINANCIAL CREDITOR**

**VERSUS**

**ROTOMAC GLOBAL PVT. LTD.,**

A company incorporated under the laws of India with its registered office at 201 City Centre, Premises No.63/2, The Mall, Kanpur, Uttar Pradesh – 208 004, India.

..... **CORPORATE DEBTOR**

**AND**

**BANK OF BARODA,**

A body corporate constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 and having its Head Office at Suraj Plaza-1, Sayaji Ganj, Mandavi, Baroda – 390 020 and Corporate Office at Baroda Corporate Centre, Bandra Kurla Complex, Bandra (East), Mumbai – 400 051 and acting through its International Business Branch, with its office at 17/14, The Mall, Kanpur, Uttar Pradesh – 208 001, India.

..... **APPLICANT/FINANCIAL CREDITOR**

**VERSUS**

**ROTOMAC EXPORTS PVT. LTD.,**

A company incorporated under the laws of India with its registered office at 201 City Centre, Premises No.63/2, The Mall, Kanpur, Uttar Pradesh – 208 004, India.

..... **CORPORATE DEBTOR**



**JUDGMENT/ORDER DELIVERED ON 20.09.2017****CORAM : SH. HARIHAR PRAKASH CHATURVEDI, MEMBER (J)**

**For the Financial Creditor :** Sh. Anurag Khanna, Sr. Advocate.  
*Alongwith,*  
 Sh. Rahul Agarwal, Advocate.

**For the Corporate Debtor :** Sh. Navin Sinha, Sr. Advocate.  
*Alongwith,*  
 Sh. Dinesh Kakkar, Advocate.

**AS PER : SH. HARIHAR PRAKASH CHATURVEDI, MEMBER (J)****JUDGMENT/COMMON ORDER**

Present Insolvency Applications i.e CP No.(IB)70/ALD/2017 and CP No.(IB)71/ALD/2017 are filed by the Financial Creditor (the Bank of Baroda) against the Corporate Debtor Companies Rotomac Global Private Limited and Rotomac Exports Private Limited respectively.

These applications have been filed U/s 7 of the Insolvency & Bankruptcy Code, 2016 [*hereinafter referred to as "the Code"*] read with Rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for triggering the Corporate Insolvency Resolution Process in respect of the corporate debtor companies namely **M/s Rotomac Global Private Limited (being principal borrower) and further M/s Rotomac Exports Private Limited** (as being surety to the loan availed).

Hence, both the applications were heard together and for the sake of convenience, are being disposed of by this common order.

Brief facts of the case, as per the Applicant Bank is that the Corporate Debtor Company has committed default in making payment of its debts for outstanding amount of **Rs.553,78,21,954.66/-** (Rupees Five hundred and Fifty-Three Crores, Seventy-Eight Lakhs, Twenty-One Thousand, Nine Hundred and Fifty-Four and Sixty-Six Paise Only) such loan facilities



have been availed by the borrower company M/s Rotomac Global Pvt. Ltd. to which the another Corporate Debtor Company (in CP No.71/2017) e.g. M/s Rotomac Exports has stood as guarantor. In addition to such loan the admitted outstanding debts due by the Corporate Debtors in respect of other secured creditors also comes around to **Rs.4,420/- Crores (*Rupees Four Thousand Four Hundred Twenty Crores*)** which is evident from the company's own letter dated 14<sup>th</sup> March, 2016 in respect of the loan amount advanced to the Rotomac Global Pvt. Ltd. being a principal borrower for which the Rotomac Export Pvt. Ltd. Company (herein the Corporate Debtor in CP No.71 of 2017) stood as corporate guarantor. Hence, as per the Applicant Banks, their liabilities are joint and several co-extensive with the liabilities of principal borrower. It is stated that a default is occurred U/s 3(11) of the I & B Code in making repayments of debts.

In support of its claim, the Applicant Bank has produced certain documents which are annexed with the present Insolvency & Bankruptcy applications to meet the requirement of Section 3(11) of the Code which includes among other i.e. statement of accounts for the Borrower, CIBIL Report, Report of the Independent Auditor pertaining to the Borrower, Order of the Debt Recovery Tribunal (Allahabad Bench) in OA 613 of 2006.

Further, the above stated documents annexed are stated as under:-

- I. A letter from the Borrower to the financial Creditor dated March 14<sup>th</sup>, 2016 acknowledging debt owed to it under the Working Capital Consortium Agreement dated October 06<sup>th</sup>, 2015.
- II. A letter from the Borrower to the financial Creditor dated March 31<sup>st</sup>, 2016 acknowledging debt to the tune of Rs.35 Crores.



**III.** A reply of the Borrower to notice issued by the Financial Creditor under Section 13(2) of the SARFAESI Act, dated November 28<sup>th</sup>, 2016.

**IV.** The demand Notice sent by the financial creditor to the Corporate Debtor Company Rotomac Exports Pvt. Ltd. by invoking the corporate guarantee issued by it on February 03<sup>rd</sup>, 2014 and for demanding payment to the tune of **Rs.529,25,95,650.67/-** (as on November 21<sup>st</sup>, 2016) in respect of loans availed by the Borrower.

**V.** The recall letter sent by Financial Creditor to the Borrower dated May 11<sup>th</sup>, 2016.

**VI.** A demand Notice sent by the Financial Creditor to *interalia* the Corporate Debtor Company and the Borrower dated October 04<sup>th</sup>, 2016 for repayment of Rs.515,99,56,040.13/-.

**VII.** The Demand Notice sent by the Financial Creditor to the Borrower under Section 13(2) of SARFAESI dated November 21<sup>st</sup>, 2016 for repayment of Rs.529,25,95,650,67/-.



Corporate Guarantee given by Corporate Debtor (e.g. M/s Rotomac Exports Ltd.)

<b>I.</b>	Corporate Guarantee No.1	dated 16.01.2001
<b>II.</b>	Corporate Guarantee No.2	dated 13.12.2010
<b>III.</b>	Corporate Guarantee No.3	dated 23.01.2012
<b>IV.</b>	Corporate Guarantee No.4	dated 03.02.2014
<b>V.</b>	Consortium Corporate Guarantee	dated 06.10.2015

The applicant Bank has annexed also a written communication which is sent by the proposed Interim Resolution Professional in Form No.II informing such that there is no disciplinary proceeding pending against him.

Hence, the present applications to trigger the CIRP against the Corporate Debtor Companies.

1. In opposition of these applications, the Corporate Debtor Companies have raised objection stating that the Applicant-Bank was granting to it certain loan facilities from 2009 onwards and time to time. The last loan facilities were sanctioned to a sum of Rs.435 crores as per the Consortium of Bank's Agreement. As the total loan availed by the Corporate Debtor Company through all the members Banks of Consortium (including the Bank of India as a Lead Bank) comes around to Rs.2,129/- Crores. Thus, as per the Corporate Debtor Companies such outstanding against the present Applicant Bank/Financial Creditor in view of the amounts of loan advanced by the Consortium Banks comes only to 22% of the entire debts. It is reported that the Consortium of Banks is comprised of seven banks namely:-



- i. Bank of India (Lead Bank)
- ii. Indian Overseas Bank
- iii. Bank of Baroda
- iv. Allahabad Bank
- v. Union Bank of India
- vi. Oriental Bank of Commerce
- vii. Bank of Maharashtra

2. As per the Corporate Debtor Company, the demand for making repayment of such loan was first made by the Applicant-Bank on 04.10.2016, and not in 2015 as have been stated in the present applications.
3. It is stated/contended that the Applicant Bank has already initiated proceedings before the Debts Recovery Tribunal, Allahabad Bench,



Allahabad vide OA No.613 of 2016 and by the order dated 10.01.2017 (Exhibit XV0 the Debts Recovery Tribunal, Allahabad has issued a recovery certificate against the present Corporate Debtor which includes guarantors e.g. M/s Rotomac Exports Pvt. Ltd. Furthermore, the said recovery certificate is under execution by initiating a recovery proceeding before the Recovery Officer of the DRT, Allahabad who has already issued a notice on 29.05.2017 under section 29 of the RDDBFI Act, 1993 to the Corporate Debtors.

4. It is also contended that apart the Applicant Bank has further issued notice dated 21.11.2016 under Section 13(2) of SARFAESI Act, and consequent thereto a symbolic possession has also been taken by the Bank U/s 13(4) of the SARFAESI Act in respect of secured/mortgaged properties.
5. It is also contended that although the Debts Recovery Tribunal, Allahabad passed an order for issuing recovery certificates against the Corporate Debtor Company, but it was kind enough to grant time for one year from the date of its order to make payment of such amount with such a direction that in event of non-payment by the company during such period of one year, then such period may further be extendable upto another six months to enable the respondents to liquidate its outstanding to the Applicant-Bank.



It is stated that certain differences have arisen between the Management and the Applicant-Financial Creditor Bank, due to such, the Bank has refused to give further financial assistance to the Corporate Debtor Companies.

Therefore, a Joint Lender's Forum has earlier been constituted on 06.04.2015 with the Bank of India as being Lead Banker and with other Banks in terms of the RBI guidelines dated 26.12.2014. It is reported that pursuant thereto, 8 meetings of the Joint Lender's Forum have so far been convened on the issue of restructuring of debts between the periods 19.06.2015 to 05.11.2016 and the Banks were working out for a restructuring programme but till the last meeting of JLF held on 5<sup>th</sup> November, 2016 such Resolution Plan could not be materialized and thereafter, no JLF meeting could be held. On such pretext that the Financial Creditor Bank has initiated a debt recovery proceeding against the Corporate Debtor in the DRT, Allahabad as well as under the SARFAESI Act.

It is also alleged that Financial Creditor Bank went on further to declare the Corporate Debtor as *wilful defaulter* by its decision dated 04.03.2017. Hence, such action of the Bank was impugned in a Writ Petition No.12648 of 2017 filed by the Corporate Debtor Company before the Hon'ble Allahabad High Court. The above said writ petition came to be disposed of by the Hon'ble High Court's order dated 20.04.2017 with following direction/observation:-



**“The Review Committee, thereafter shall pass a fresh order, as expeditiously as possible and in any case on or before 20.05.2017. After a fresh order is passed by the Review Committee, as aforesaid the orders’ dated 15.02.2017 and 04.03.2017 shall render in effective.”**

6. During the course of hearing, some clarifications were sought for by this Court from the Financial Creditor/Applicant Bank who informed

such that its above referred decision, has been duly reconsidered pursuant to the (above stated) directions of the Hon'ble Allahabad High Court but there is no change in it. Thus, the Corporate Debtor Company still stands categorised as a *wilful defaulter*. The Corporate Debtor Company Rotomac Pvt. Ltd. made such allegation that Applicant Bank took such decision deliberately despite such being facts that, it itself had participated in the JLF meeting held in Mumbai on 05.11.2016.

7. It is further contended that the loan percentage of the present Applicant-Bank is Limited only 22% of the total outstanding debts due to these Banks which comes around Rs.2,620/- Crores.
8. It is submitted that the Corporate Debtor Companies are pursuing the matter with the Lead Bank as well as the other Banks to take a decision for bringing the company back on track by preparing a resolution plan and restructuring the debts but because of filing of the present application for part amount of Rs.500 Crores (odd), will necessarily jeopardize the process of coming for settlement with the lead bank as well as with the other banks, who are holding a stake of almost 80% of total outstanding debts.
9. It is also contended that, if one banker from the Consortium of Banks declare the borrower company as a *wilful defaulter* then it will necessarily fetter its restructuring process. In support of such contention the Corporate Debtors have referred to a Reserve Bank of India's Circular dated 26.02.2014, which speaks such to consider "**the possibility of restructuring the Account, if it is prima facie viable and borrower is not a wilful defaulter.**" However, since the



*[Handwritten signature]*



Corporate Debtor has been declared as a *wilful defaulter* the proceedings before the JLF are going to adversely affected.

10. It is also contended that the amount of debts due to the Applicant-Bank of Baroda is only a part of substantial amount due by the Corporate Debtor Company to the various other Banks, those have not yet opted to file present application. Hence, admission of the present applications under the I & B Code would certainly jeopardize the entire process of restructuring of account of Corporate Debtor Company, and if the company goes into liquidation, then there is every possibility that the present Applicant-Bank may not get any redress from such liquidation as per the Applicant Bank is not a Financer.
11. The Corporate Debtor Companies have further pointed out that the manufacturing activities of the Company are being carried out from Kanpur, Jamnagar and Ahmadabad wherein around 1000 employees are engaged on regular basis. Therefore, the result of admission of the instant applications will necessarily lead to their un-employment and displacement of their families.
12. It is also submitted that the Corporate Debtor Companies are hopeful enough that some positive result will come out in the JLF meeting that may be convened in immediate future (depending upon the convenience of the various Banks). Hence, in the interest of justice the present applications are liable to be dismissed with costs.



The Applicant-Financial Creditor in its rejoinder to the above stated objection has filed affidavit of its Senior Manager Mr. Chandra Shekhar Awasthi stating *inter alia* that the financial creditor filed its

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Supplementary Affidavit-II on 21.06.2017 with respect to the observations made by this Tribunal with regard to *interalia* the maintainability of the present company petition.

The Applicant/Financial Creditor by way of this affidavit is bringing on record its reply to the objections/counter affidavit filed by the Corporate Debtor. It is humbly submitted that:-

- i. The contents of paragraphs no.1 to 5 of the Counter Affidavit are either matters of record or statements of fact.
- ii. Vide the statements made in paragraphs 6, 7, 8, 11 & 25, the Corporate Debtor is admitting the fact that it has availed a debt from the Applicant and that it is in default with respect to that debt.
- iii. With reference to paragraphs 9, 9A, 10, 13, 14, 15, 20, 22 & 23, it is submitted that the fact that the financial creditor has initiated proceedings before the Debt Recovery Tribunal, Allahabad Bench and it has also initiated proceeding under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, or that the pendency of certain proceedings before the Hon'ble High Court in Misc. Writ Petition No.12648 of 2017, are not impediments to a financial creditor for moving an application before this Hon'ble Tribunal under Section 7 of the Insolvency Code, and in no manner affects its ability to do so.



*[Handwritten signature]*

- iv. With reference to the submissions made by the Corporate Debtor in paragraphs 12, 16, 17, 18, 19, 21, 22, 24 & 27 of the Counter Affidavit. It is replied that the fact that certain other creditors of the Corporate Debtor Companies are working on certain mechanism to fix the default position of the Corporate Debtor but it does not create a bar to the Financial Creditor to approach Hon'ble Tribunal by filing present application under the provisions of the Code and nor it absolve the Corporate Debtor Companies from its obligation to repay its debt availed from the present Financial Creditor. In this respect, the Financial Creditor has placed reliance on an order of the Hon'ble Appellate Tribunal in the matter of M/s Innoventive Industries Ltd. v/s ICICI Bank & Anr. [Company Appeal (AT) (Insolvency) No.1 & 2 of 2017], wherein the Hon'ble Appellate Tribunal has dealt with the question of whether in a case the Joint Lender's Forum (JLF) reached agreement and considering the debts restructuring of the Corporate Debtor, then its prior permission is required by the financial creditor before filing an application under Section 7 of the present Code. In this context, the Hon'ble NCLAT held and observed as such:-



*“Insofar as the Master Restructuring Agreement dated 8<sup>th</sup> 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 the financial creditor.”*

*“the Tribunal has noticed that there is a failure on the part of the appellant to pay debts. The Financial*

*Creditor has attached different records in support of default of payment. Apart from that it is not supposed to go beyond the question to see whether there is a failure on fulfilment of obligation by the financial creditor under one or other agreement....”*

*“.....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 on or other authority, including the JLF.”*

It is submitted that in fact, several other creditors including Union Bank of India, Bank of India, Indian Overseas Bank and Oriental Bank of Commerce have also initiated DRT proceedings against the Corporate Debtor.

With reference to paragraph 26 of the Counter Affidavit, it is contended that the facts mentioned therein have no bearing on the issue of default committed by the Corporate Debtor Companies and it appears to be a frivolous attempt by it to divert the attention of this Hon'ble Tribunal from the actual issue of commission of its default. In fact throughout in the contents of the Counter Affidavit, the Corporate Debtor nowhere contested the claim of the Financial Creditor and in fact has admitted its default clearly.

During the course of hearing, this Court vide its order dated 15.06.2017 further sought for certain clarification on procedural irregularity and defects by issuing a notice under Section 7(5) of the I & B Code to the Financial Creditor which has been replied through an affidavit of Mr. Chandra Shekhar Awasthi, wherein the Applicant Bank took such a plea by bringing on record a Power of Attorney dated June 19<sup>th</sup>, 2017 executed by its Power of Attorney holder Sh. Brijesh Kumar Singh by appointing & authorizing to Mr. Chandra Shekhar Awasthi as an attorney to file application on behalf of the Applicant Bank against the Corporate Debtor Companies including filing of the present application i.e. CP No.(IB)70/ALD/2017 & CP No.(IB)71/ALD/2017. Thus, the Bank has



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duly ratified the authority of authorisation in favour of Mr. Chandra Shekhar Awasthi to sign the pleadings and to file the present application. A copy of such power of attorney dated 19<sup>th</sup> June, 2017 is placed on record alongwith his affidavit. The Applicant Bank further took such plea that the pendency of the recovery proceeding before the DRT, Allahabad and proceeding under the SARFAESI Act are not impediments to a Financial Creditor for making an application U/s 7 of the I & B Code before this Tribunal and in no manner affects its eligibility to do so. Further, the Applicant Bank placed reliance on a latest decision of Hon'ble Supreme Court in the matter of **Innoventive Industries Ltd. v/s ICICI Bank & Anr.** and also to the view taken by the **Hon'ble NCLT, Chandigarh Bench in the matter of Punjab National Bank v/s M/s James Hotels & Ors.**, wherein it has been held that **the provisions of the I & B Code are having over riding effect over other laws and being latest law on the subject, hence, the proceedings before DRT will not debar the right of Financial Creditor to file the application U/s 7 of the Code.** It is also emphasised that the proceedings under the

RDDDBFI Act is different one then the proceedings of I & B Code before the NCLT as the formal relate to recovery of debt due to the Bank and Financial institution by way of proceeding against the secured assets of debtor, however, the later Code provides for securing assets of debtor in initial nine months and to ascertain its liability for revival of a company or for a speedy liquidation. Therefore, the later Code balance the interests of all the stakeholders including alteration in the priority of payment of Government dues. It is also contended before us, in case the court finds that the present applications fulfil the requirement of Section 7 read with Section 3(11) & (12), then it is not expected to call for further explanation/submission keeping in view of language U/s 7(5)(b) of the Code and thus the Court being





an Adjudicating Authority is expected to admit the present application for triggering the CIRP in respect of the Corporate Debtor Companies.

We have perused the pleadings and documents annexed therewith filed by the applicant Financial Creditors as well as of the Corporate Debtor Companies. We duly considered the above stated rival submissions put forth before us by the learned counsel for both the parties i.e. Sh. Anurag Khanna, Ld. Sr. Advocate alongwith Sh. Rahul Agarwal, Advocate for the Financial Creditor and Sh. Navin Sinha, Ld. Sr. Advocate alongwith Sh. Dinesh Kakkar, Advocate on behalf of the Corporate Debtor Company. The Ld. Sr. Advocate representing the Financial Creditor drew our attention to the decision of the Hon'ble NCLAT passed in the matter of **Innoventive Industries Ltd. v/s ICICI Bank & Anr.**, wherein it has been held and ruled that the Adjudicating Authority on receipt of application U/s 7(2) is required to ascertain existence of default on the basis of evidence furnished by the Financial Creditor under sub-Section (3) including Joint Lender Forum. Therefore, Ld. Sr. Advocate for applicant, the Adjudicating Authority is not required to look into any other factor for consideration of admission or rejection of the present application except to as provided in the Code and on occurrence of default U/s 7, it is immaterial for deciding the present application as to whether a prior permission of or consent from **one or other authority including the JLF is obtained or otherwise**. Therefore, according to him, the present application deserves for admission.



In contra to this, Sh. Navin Sinha, Ld. Sr. Advocate alongwith Advocate Sh. Dinesh Kakkar for the Corporate Debtor Company would submit that the financial creditor was not fair enough to approach this Court because the debt owed to the Applicant Bank is only 22% of the total debt

owed to the consortium of Bank/other Banks except the present applicant other Banks have not opted to initiate such proceedings, but went to constitute a Joint Lender's Forum on 26.12.2014 when the amount of the Corporate Debtor Companies become irregular. Such JLF has been constituted as per the statutory guidelines of RBI dated 06.04.2015 for the purpose of Revitalising Distressed Assets in the economy through Joint Lender's Forum and Corrective Action Plan (Reference may kindly be made to Annexure 8 of the Counter Affidavit at Page 35-Statutory Guidelines of the RBI). The present Applicant Bank is also a member.

Therefore, it is submitted that instead of the fact, 8 meetings of JLF were held between the period from 09.06.2015 to 05.11.2016 for the purpose of restructuring the debt of Corporate Debtor with a view to come up with a viable plan for rehabilitating the financial condition of the Corporate Debtor Company so as to ensure the repayment of the loans owed to the various constituent financial institutions of the JLF, to which the present Applicant Bank was also party by representing its meeting in the JLF but in later course opted out from such proceedings moreover deliberately went on



further to declare and categorized the Corporate Debtor Company as a wilful defaulter by its decision dated 04.03.2017 which is done with some malafide

intention to make the Corporate Debtor Companies ineligible for seeking restructuring of its debts and to put a complete stop on all the activities of the Joint Lender's Forum. Therefore, it is alleged such that the Bank has taken steps in contravention to the Statutory guidelines issued by the RBI, hence, filing of the present application under the I & B Code should not be entertained. In addition to this, the Ld. Sr. Advocate further stressed on such point the Bank has already availed effective and efficacious remedy for

recovery of its debt under the SARFAESI Act and RDDBFI Act before the DRT, Allahabad, hence, such attempt and act on the part of the Applicant Bank/Financial Creditor is wholly impermissible in law as this would amount to FORUM SHOPPING. In support of his contention, he placed reliance on a decision of the Hon'ble Principal Bench of the NCLT in the matter of **Annapurna Infrastructure Pvt. Ltd. v/s Soril Inra Resources Ltd. (CP No.(IB)-22(PB)/2017 in para 27-**

*"We are further of the view that already proceedings fore execution of the award have been initiated. An effective remedy has been availed by the applicant. We have not been able to accept that a party can invoke more than one remedy simultaneously. It is in fact against the fundamental principles of judicial administration to allow a party to avail more than one remedies. Ordinarily only one remedy at one time could be availed as is evident from the fundamental principles laid down in Section 10 CPC. It would promote forum shopping which is wholly impermissible in law".*

He further placed reliance on a decision of the **Bombay High Court in Company Application No.470 of 2016 in Company Petition No.570/2016 (alongwith group of matters) in the matter of IDFC Bank Ltd. v/s Ruchi Soya Industries Ltd.,** wherein the Ld. Single Judge of the



Hon'ble Bombay High Court took such view by observing that if 98% of the creditors in value of the total dues of respondent are agreed to oppose the winding up petition are participating in JLF's meetings to take steps for rectification and restructuring of the debts of respondent company then a winding up petition at the instance of a petitioner who claims only 1% of the total debts of the respondent company cannot be entertained and such order of winding up in favour of the petitioner would not benefit generally the petitioner nor the creditors of the respondent company. Thus, the Hon'ble Bombay High Court has pleased to consider the wishes of large number of creditors who were seriously opposing the winding up of the respondent

company as they had agreed to take steps to revive the respondent company by taking corrective action plan. In view of this the winding up petition was dismissed by the Hon'ble Bombay High Court.

We gave due importance to the above stated judgment, however, with due respect to the Hon'ble Bombay High Court and Hon'ble Principal Bench, NLCT in the above referred judgment in our humble opinion the above stated judgment is not of much assistance to the present Corporate Debtor Companies. Keeping in view, the statutory provision of the Section 7 of the Code wherein pendency of a dispute is no Bar to a Financial Creditor when default occurred is of more than Rupees One Lakh to move the CIRP in respect of Corporate Debtor. Further, the Hon'ble Supreme Court in its recent judgment in **Innoventive Industries v/s ICICI Bank & Anr.** As well as the Hon'ble NCLAT its decision in the very same matter has held the provision of the I & B Code are having overriding effect U/s 238 of the Code. Hence, in our humble view the judgments as referred to on behalf of the Corporate Debtor Companies are distinguishable and may not apply to the fact of the present case. As the facts & circumstances of the case were different before the **Hon'ble Bombay High Court in the matter of IDFC Bank Ltd. v/s Ruchi Soya Industries Ltd.** as in that case the other creditors came forward to oppose the winding up petition, which is not the case here before this Tribunal as during the course of hearing through the Corporate Debtor Company the views from the lead Bank of the Consortium Bank were expected by informing such it about the pendency and current proceedings before the JLF but no member other than the applicant Bank came forward to express its view on the maintainability of present application and opted to remain silent. Moreover, it is a fact the functioning of the JLF is now not





workable since the Corporate Debtor Company has been declared as a wilful defaulter. That apart the Hon'ble NCLT in the matter of **Annapurna Infrastructure Pvt. Ltd. v/s Soril Inra Resources Ltd.** took a view on such issue where an adjudication between the same parties is pending in a Court having jurisdiction to adjudicate upon the same and a subsequently instituted suit on the basis of same issue between the same parties cannot be allowed to proceed. While, we feel that the pendency of the suit is distinguishable from restructuring of debts or resolution plan pending under consideration before the Joint Lender's Forum. Moreover, the Hon'ble Supreme Court in the above referred recent judgment in the matter of **Innoventive Industries Ltd. v/s ICICI Bank & Anr.** has ruled to set up a guidelines and pleased to issue a mandate to us by observing as such, "because this is very first application that has been moved under the Code, we thought it necessary to deliver a detailed judgment so that all Courts and Tribunals may take notice of a paradigm shift in the law. Entrenched managements are no longer allowed to continue in management if they cannot pay their debts."



The Insolvency & Bankruptcy Code, 2016 has been passed after great deliberation and pursuant to various committee reports, the most important of which is the report of the Bankruptcy Law Reforms Committee of November, 2015. The Statement of Objects & Reasons of the Code read as under:

#### ***"STATEMENT OF OBJECTS & REASONS***

*There is no single law in India that deals with Insolvency and Bankruptcy. Provisions relating to insolvency and bankruptcy for companies can be found in the Sick Industrial Companies (Special Provisions) Act, 1985, the Recovery of Debt Due to Banks and Financial Institutions Act, 1993, the Securitisation and*



*Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the Companies Act, 2013. These statutes provide for creation of multiple for a such as Board of Industrial and Financial Reconstruction (BIFR), Debt Recovery Tribunal (DRT) and National Company Law Tribunal (NCLT) and their respective Appellate Tribunals. Liquidation of companies is handled by the High Courts. Individual Bankruptcy & Insolvency is dealt with under the Presidency Towns Insolvency Act, 1909, and the Provincial Insolvency Act, 1920 and is dealt with by the Courts. The existing framework for insolvency and bankruptcy is inadequate, ineffective and results in undue delays in resolution, therefore, the proposed legislation.*

*The objective of the Insolvency & Bankruptcy Code, 2015 is to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the priority of payment of government dues and to establish an Insolvency and Bankruptcy Fund, and matters connected therewith or incidental thereto. An effective legal framework for timely resolution of insolvency and bankruptcy would support development of credit markets and encourage entrepreneurship. It would also improve Ease of Doing Business, and facilitate more investments leading to higher economic growth and development.*



*The Code seeks to provide for designating the NCLT & DRT as the Adjudicating Authorities for corporate persons and firms and individuals, respectively, for resolution of insolvency, liquidation and bankruptcy. The code separates commercial aspects of insolvency and bankruptcy proceedings from judicial aspects. The Code also seeks to provide for establishment of the Insolvency and Bankruptcy Board of India (Board) for regulation of insolvency professionals, insolvency professional agencies and information utilities. Till the Board is established, the Central Government shall exercise all powers of the Board or designate any financial sector regulator to exercise the powers and functions of the Board. Insolvency professional will assist in completion of insolvency resolution, liquidation and bankruptcy proceedings envisaged in the Code. Information*

*utilities would collect, collate, authenticate and disseminate financial information to facilitate such proceedings. The Code also proposes to establish a fund to be called the Insolvency and Bankruptcy Fund of India for the purposes specified in the Code.*

*The Code seeks to provide for amendments in the Indian Partnership Act, 1932, the Central Excise Act, 1944, Customs Act, 1962, Income Tax Act, 1961, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Finance Act, 1994, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the Sick Industrial Companies (Special Provisions) Repeal Act, 2003, the Payment and Settlement Systems Act, 2007, the Limited Liability Partnership Act, 2008, and the Companies Act, 2013.*

*The code seeks to achieve the above objectives.”*

(Emphasis Supplied)

One of the important objectives of the Code is to bring the insolvency law in India under a single unified umbrella with the object of speeding up of the insolvency process. As per the data available with the World Bank in 2016, insolvency resolution in India took 4.3 years on an average, which was much higher when compared with the United Kingdom (1 year), USA (1.5 years) and South Africa (2 years). The World Bank's Ease of Doing Business Index, 2015, ranked India as country number 135 out of 190 countries on the ease of resolving insolvency based on various indicia.



The UK Law, on the other hand, is governed by the Insolvency Act of 1986 which has served as a model for the present Code. While piloting the Code in Parliament, Shri Arun Jaitley, Learned Finance Minister, stated on the floor of the House:

“SHRI ARUN JAITLEY: One of the differences between your Chapter 11 and this is that in

Chapter 11, the debtor continues to be in possession. Here the creditors will be in possession. Now, the SICA is being phased out, and I will tell you one of the reasons why SICA didn't function. Under SICA, the predominant experience has been this, and that is why a decision was taken way back in 2002 to repeal SICA when the original Company Law amendments were passed. Now, since they were challenged before the Supreme Court, it didn't come into operation. Now, the object behind SICA was revival of sick companies. But not too many revivals took place. But what happened in the process was that a protective wall was created under SICA that once you enter the BIFR, nobody can recover money from you. So, that non-performing investment became more non-performing because the companies were not being revived and the banks were also unable to pursue any demand as far as those sick companies were concerned, and therefore, SICA runs contrary to this whole concept of exit that if a particular management is not in apposition to run a company, then instead of the company closing down under this management, a more liquid and a professional management must come and then save this company. That is the whole object. And if nobody can save it, rather than allowing it to be squandered, the assets must be distributed – as the Joint committee has decided – in accordance with the waterfall mechanism which they have created.”

(Emphasis Supplied)



It is now matter of record that the Corporate Debtor Company M/s Rotomac Global Pvt. Ltd. still stands categorized as a *wilful defaulter* in the review/reconsidered decision dated 04.03.2017 of the Bank of Baroda /Financial Creditor by reiterating the same. Such review of its decision is made pursuant to a direction issued by the Hon'ble Allahabad High Court in the above referred writ petition which may be subject to further challenge before the Hon'ble Allahabad High Court, but the things remains still unchanged until such decision (to classify the Corporate Debtor as a wilful defaulter) is not reversed by the Hon'ble High Court

or by a competent court of law. Thus, in our view, till then the Joint Lender's Forum is not in a position to work on preparation of a resolution plan, if any, in respect of the Corporate Debtor Company, nor such plan can be materialized until & unless such legal disability/procedural difficulty is removed by a competent Court of Law. It is also reported that the meetings of the JLF are not being convened since long nor any resolution plan in respect of the Corporate Debtor Companies has so far been materialised.

Thus, in the light of above stated discussion and by perusal of the present applications filed by the Financial Creditor, it seems that these are found to be filed in conformity with Section 7 of Code to meet the requirement of Section 3(11) and 3(12) of the Code, which reads as under:-

**Section 3(11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;**

**Section 3(12) "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debt, as the case may be;**



Keeping in view of the above stated provision of the I & B Code, the present applications/petitions are found complete for admission and to trigger a CIRP in respect of Corporate Debtor Companies, moreover, the legal position in I & B Code has recently been settled by Hon'ble Apex Court in the matter of *M/s. Innoventive Industries Ltd versus ICICI Bank & Anr.*<sup>1</sup>

<sup>1</sup> Civil Appeal nos. 8337-8338 of 2017



wherein it has been held as such, the moment the court is satisfied that a default has occurred, then the application filed by the financial creditor under Section 7 of the Code must be admitted (unless it is found incomplete) the Hon'ble Supreme Court further pleased to observe, *“that the non-obstante clause, in the widest terms possible, is contained in Section 238 of the Code, so that any right of the corporate debtor under any other law cannot come in the way of the Code”*.

Further, the Hon'ble NCLAT, in the very same case before, it has ruled that the 'Adjudicating Authority' on receipt of the application under Section 7 sub-section (2) is required to ascertain existence of default on the basis of evidence furnished by the Financial Creditor under sub-section (3). The 'adjudicating authority' is required to satisfy three things Occurrence of default; application is complete and no disciplinary proceedings is pending against the proposed Insolvency Resolution Professional. Beyond the aforesaid practice, this 'Adjudicating Authority' is not required to look into any other factor; including the question whether permission or consent is obtained from one or other authority, *including the JLF (Joint Lender's Forum)*. ”



Further, the Hon'ble Allahabad High Court in its recent decision in the matter of Sanjeev Shriya v/s State Bank of India & 6 Ors. (Writ-C No.30285/2017) and in connected case Deepak Singhania & Anr. v/s State Bank of India (Writ-C No.30033 of 2017) has also held that the provision of I & B Code would prevail over the provisions of DRT proceedings by observing (in the relevant para nos.21, 24, 29, 31 & 32 of the judgment) as such:-



21. Section 60 stipulates that the Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof, shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate person is located. As per provisions contained under Section 60 of the IBC, 2016 the National Company Law Tribunal shall be the Adjudicating Authority for insolvency resolution and liquidation of corporate debtors and also lays down the criteria for establishing the territorial jurisdiction of the Tribunal. The insolvency resolution or bankruptcy proceedings relating to a personal guarantor of a corporate debtor shall also be filed before the National Company Law Tribunal.

24. The object of IBC, 2016 is categorical and as per provisions contained under Section 60(1) the Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof, shall be the National Company Law Tribunal. In the present matter, admittedly the proceeding has been initiated under the IBC, 2016 and the Moratorium under Section 14 of the IBC, 2016 has already been issued by the NCLT. The NCLT is already ceased with the process of insolvency resolution against the company (in liq.) under IBC, 2016 and moreover, the SBI has also put their appearance in the said proceedings regarding its claim. At no point of time the SBI has disassociated itself from the proceeding before the NCLT and it is actively participating in the proceeding.



29. In the present matter, it has been urged that while passing the impugned order the DRT has failed to take notice of Part-III of IBC, 2016, which prevails over the provisions of the Act of 1993. It has also been urged that the entire proceeding before the DRT is completely without jurisdiction precisely in the backdrop that once the proceeding has already been commenced under IBC, 2016 and Moratorium under Section 14 of IBC, 2016 has already been issued and even in the said proceeding the parties have put their appearance before the insolvency professionals, then the impugned

*proceeding against the guarantors of principal debtor is per se bad.....*

*31. This Court is of the considered opinion that in the aforementioned facts & circumstances once the sufficient safeguards are provided in the IBC, 2016 & the regulations framed thereunder to the bank, and even the liability has not been crystallized either against the principal debtor or guarantors/mortgagors at present, then the proceeding, which is pending before the Debt Recovery Tribunal, Allahabad cannot go on and the same is stayed till the finalisation of corporate insolvency resolution process or till the NCLT 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.*

*32. With the aforesaid directions/observations, both the writ petitions are disposed of.*

By considering the above stated legal and factual position of the present case, such objections raised by the Corporate Debtor Companies carry no force that the Applicant Bank cannot move an application under the I & B Code before this Court, while the JLF is considering or has seized of the issue of resolution plan for the Corporate Debtor or the Applicant Bank

filed the present petition contrary to the guidelines issued by the RBI.

Because in our humble opinion such objection/contention may sound high, but remedy lie elsewhere not necessarily before this Court under the I & B Code. The company could take up such issue with the RBI but such action

does not necessarily debar the Applicant Bank for filing present application under the I & B Code before this Court nor jurisdiction of this Courts is expressly barred, if such RBI Circular/Guidelines are ignored or violated by the Applicant Bank. Moreover, M/s Rotomac Global Pvt. Ltd. earlier itself, in its letter dated March 14<sup>th</sup>, 2016 No.RGPL/2015-16 addressed to AGM,



*Handwritten signature*

Bank of India, Kanpur earlier has proposed for reassessment of its non-fund based limits from Rs.2,250/- Crores to Rs.4,220/- Crores out of which a debt of **Rs.3,100/- Crores** as a non-fund based loan has been duly admitted. Since, such being position that the Corporate Debtor Companies are not able to repay its debts then, its Board of Director cannot be expected to remain in and to keep continue with the affair of managing the company. As per its *obiter dictum* the Hon'ble Supreme Court in the above referred matter of **Innoventive v/s ICICI Bank** has pleased to refer Bankruptcy Law Reforms Committee (BLRC) Report and made some observation (in its relevant para) for the sake of convenience may be reproduced here under:

**16. At this stage, it is important to set out the important paragraphs contained in the report of the Bankruptcy Law Reforms Committee of November, 2015, as these excerpts give us a good insight into why the Code was enacted and the purpose for which it was enacted:**

XXX XXX XXX XXX

"The limited liability company is a contract between equity and debt. As long as debt obligations are met, equity owners have complete control, and creditors have no say in how the business is run. When default take place, control is supposed to transfer to the creditors; equity owners have no say."

*Under these conditions, the recovery rates obtained in India are among the lowest in the world. When default takes place, broadly speaking, lenders seem to recover 20% of the value of debt, on an NPV basis.*

When creditors know that they have weak rights resulting in a low recovery rate, they are averse to lend. Hence, lending in India is concentrated in a few large companies that have a low probability of failure. Further, secured credit dominates, as creditors rights are partially present only in this case. Lenders have an emphasis on secured credit. In this case, credit analysis is relatively easy: It only requires taking a view on the market value of the collateral. As a consequence, credit analysis as a sophisticated analysis of the business prospects of a firm has shrivelled.



XXX XXX XXX XXX

***“The key economic question in the bankruptcy process***

The Committee believes that there is only one correct forum for evaluating such possibilities, and making a decision: a creditors committee, where all financial creditors have votes in proportion to the magnitude of debt that they hold. In the past, laws in India have brought arms of the government (legislature, executive or judiciary) into this question. This has been strictly avoided by the Committee. The appropriate disposition of a defaulting firm is a business decision, and only the creditors should make it.”

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***“Speed is of essence***

Speed is of essence for the working of the bankruptcy code, for two reasons. First, while the ‘calm period’ can help keep an organisation afloat, without the full clarity of ownership and control, significant decisions cannot be made. Without effective leadership, the firm will tend to atrophy and fail. The longer the delay, the more likely it is that liquidation will be the only answer. Second, the liquidation value tends to go down with time as many assets suffer from a high economic rate of depreciation.

From the viewpoint of creditors, a good realisation can generally be obtained if the firm is sold as a going concern. Hence, when delays induce liquidation, there is value destruction. Further, even in liquidation, the realisation is lower when there are delays. Hence, delays cause value destruction. Thus, achieving a high recovery rate is primarily about identifying and combating the sources of delay.”



XXX XXX XXX XXX

***“The role that insolvency and bankruptcy plays in debt financing***

Often, an enterprise may be a successful business model while still failing to repay its creditors. A sound bankruptcy process is one that helps creditors and debtors realise and agree on whether the entity is facing financial failure and business failure. This is important to allow both parties to realise the maximum value of the business in the insolvency.”

XXX XXX XXX XXX

“Control of a company is not divine right. When a firm default on its debt, control of the company should shift to the creditors. In the absence of swift and decisive



mechanisms for achieving this, management teams and shareholders retain control after default. Bankruptcy law must address this."

In the light of the aforesaid rulings and the law of the land as declared by the Hon'ble Supreme Court under Article 141 & 144 of the Constitution of India, this Court is equally bound by it and is expected to act in aid with the Hon'ble Supreme Court. Therefore, we find that the objections as raised by the Corporate Debtor Companies are no longer relevant for rejecting the present petition under the I & B Code. Moreover, it is a matter of record that the Corporate Debtor Companies M/s Rotomac Global Private Limited itself through its letter dated 14.03.2016 has admitted its loan liability to the extent of Rs.3,100/- Crores. Such being the factual position the Company is not able to repay its debts then its management cannot be expected to have a divine right to keep continue with the managing the affair of the company.

Therefore, by considering the above stated facts & circumstances of the present applications and by following the Judicial Trends, as settled we find that the present applications deserve for admission, hence, are admitted under Section 7 of I & B Code, 2016 with such consequential directions which are given as under: -



1. That this Bench hereby appoints **Mr. Anil Goel, Registration No:IBBI/IPA-001/IPP-00118/2017-2018/10253, Address : AAA, Insolvency Professionals LLP, E-10A, Kailash Colony, Greater Kailash-I, New Delhi, National Capital Territory of Delhi 110 048; Email.id [anilgoel@aaainsolvency.com](mailto:anilgoel@aaainsolvency.com)** as Interim Resolution Professional to carry the functions as mentioned under



Insolvency and Bankruptcy Code, 2016 in respect of both the Corporate Debtor Companies.

2. That the order of moratorium u/s 14 shall have effect from *20<sup>th</sup> September, 2017* till the completion of corporate insolvency resolution process or until this Bench approves the resolution plan under subsection (1) of Section 31 or passes an order for liquidation of corporate debtor under section 33 as the case may be.
3. That this Bench hereby prohibits the institution of suits or continuation of pending suit or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; 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 SARFAESI Act, 2002; the recovery of any property by an owner or less or where such property is occupied by or in the possession of the corporate debtor.
4. That the supply of essential goods or services to corporate debtor, continuing, shall not be terminated or suspended or interrupted during the Moratorium period. The Corporate Debtor to provide effective assistance to the IRP as and when he takes charge of the Corporate Debtor.



*[Handwritten signature]*

5. That the provisions of Section 14 sub-Section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
6. That the public announcement of Corporate Insolvency Resolution Process be made immediately as specified under Section 13 of the code and calling for submissions of claim under Section 15 of the Code.
7. The Interim Resolution Professional shall perform all his functions strictly which are contemplated, *interalia*, by Sections 17, 18, 20, 21 of the Code. It is further made clear that all the personnel connected with Corporate Debtor, its promoter or any other person associated with management of the Corporate Debtor are under legal obligation under Section 19 of the Code extend every assistance and cooperation to the Interim Resolution Professional. Where any personnel of the corporate debtor, its promoter or any other person required to assist or co-operate with IRP, does not assist or co-operate, IRP would be at liberty to make appropriate application to this Tribunal with a prayer for passing an appropriate order.
8. The IRP shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor' and manage the operations of the Corporate Debtor as a going concern as a part of its obligation imposed by Section 20 of the I & B Code, 2016.



9. Further in the light of Hon'ble Supreme Court Judgement in the case of Chitra Sharma & ors. v/s Union of India & ORS.<sup>2</sup> read with decision of this bench in the matter of Prabodh Kumar Gupta & ors. v/s Jaypee Infratech Limited and in the spirit of Preamble of present Insolvency and Bankruptcy Code and considering the guiding principles as described in Bankruptcy Law Reform Committee Report, IRP is expected to take care of the interest of other Creditors and stakeholders, who are not necessarily coming under definition of "Financial Creditor" or "Operational Creditor" but whose needs may appears to be greater than others.
10. The Registry is hereby directed to communicate a copy of this order to the Financial Creditor and the Corporate Debtor after the completion of necessary formalities.
11. A Copy of this order may also be communicated to the IRP as well as to Insolvency and Bankruptcy Board of India. No order as to cost.



**Dated: 20.09.2017**

Typed by:  
Kavya Prakash Srivastava  
(Stenographer)

**H.P. Chaturvedi,  
(Member Judicial)**

<sup>2</sup> Writ Petition(s)(Civil)No.744/2017