

**IN THE NATIONAL COMPANY LAW TRIBUNAL
“CHANDIGARH BENCH, CHANDIGARH”**
(Exercising powers of Adjudicating Authority under
the Insolvency and Bankruptcy Code, 2016)

CP (IB) No.102/Chd/Pb/2017

**Under Section 7 of Insolvency &
Bankruptcy Code, 2016.**

In the matter of:

Punjab National Bank,
a Bank constituted under Banking Companies
(Acquisition & Transfer of Undertakings) Act, 1970,
having its Head Office at
7, Bhikaji Cama Place,
New Delhi - 110067

... Petitioner/Financial Creditor

Vs.

M/s Rishi Ganga Power Corporation Ltd.
having its Registered Office at Rajit House,
B-23, Phase II, Focal Point, Ludhiana.

...Respondent/Corporate Debtor

Order delivered on: 25.01.2018

Coram: Hon'ble Mr.Justice R.P.Nagrath, Member (Judicial)

For the Petitioner/Financial Creditor: 1) Mr. Harsh Garg, Advocate
2) Mr.Pulkit Goyal, Advocate

For the Respondent/Corporate Debtor: Mr.Anil Aggarwal, Advocate

ORDER

This petition has been filed by Punjab National Bank, constituted on 31.03.1970 under Banking Companies (Acquisition & Transfer of Undertakings) Act, 1970, having its registered office at Bhikaji Cama Place, New Delhi, through Mr.Viney Kumar Bhandari, Assistant General Manager of Branch at Industrial Area, Ludhiana. The petitioner Bank has executed power

of attorney dated 30.12.1989 Annexure I/1 in favour of Mr.Viney Kumar Bhandari.

2. This petition has been filed by the Bank as a Financial Creditor under Section 7 of the Insolvency & Bankruptcy Code, 2016 (for short to be referred here-in-after as the 'Code') with the application in Form No.1 as prescribed under rule 4(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity the 'Rules') for initiating insolvency resolution process against the respondent-corporate debtor.

3. The respondent company was incorporated on 12.07.1996 and its present authorised and paid-up share capital is ₹29 crores. The Bank has annexed copy of Memorandum and Articles of Association of the company as at Annexure I/2. The respondent company has its registered office at Ludhiana and therefore, the matter falls within the territorial jurisdiction of this Tribunal.

4. The facts of the case, briefly stated, are that the respondent-corporate debtor was incorporated for setting up an 8.25 MW hydro power project on Rishi Ganga River. For the said purpose, the corporate debtor applied to the petitioner Bank for the sanction of term loan to the tune of ₹45 crores. The request was considered by the Bank and term loan of ₹25 crores was sanctioned and released to the corporate debtor. Annexure I/10 is the sanction letter dated 04.07.2006 issued by the Bank in this regard. It is further stated that the interest was to be paid @ 1.25% per annum below Bank Prime Lending Rate (BPLR) plus 0.5% (TP), i.e. 10.50% with the then effective rate with monthly rests. This loan was repayable in 84 monthly instalments of ₹27.09 lacs after the moratorium period of 18 months, after the commencement of commercial production. Vide resolution dated 29.04.2006 of the Board of

Directors of the respondent company Mr.Rakesh Mehra was authorised to execute necessary security documents. Annexure I/11 is the copy of the resolution. The respondent-corporate debtor executed agreement of hypothecation dated 02.05.2006 Annexure I/12, agreement of guarantee of even date Annexure I/13 (Colly), and also letter of undertaking and the guarantee agreement by the Directors, all of even date, to secure Term loan.

5. It is further stated that the corporate debtor was in need of further finances and made a request for term loan of ₹14.30 crores for expansion of business. The aforesaid request was acceded to by the Bank vide sanction letter dated 17.06.2008 Annexure I/14. In this regard, the corporate debtor passed resolution Annexure I/15 dated 02.09.2008 in the meeting of its Board of Directors. The corporate debtor also executed agreement of hypothecation dated 11.09.2008 Annexure I/16; supplementary agreement dated 12.09.2008, Annexure I-17; agreement of guarantee dated 11.09.2008, Annexure I/18. In this way total term loan of ₹39.30 crores was sanctioned and released.

6. The corporate debtor applied for further finances and made application for the grant of additional term loan of ₹7.86 crores, which was granted vide sanction letter dated 13.07.2009 Annexure I/19. The overall facilities were increased to ₹47.16 crores. In this regard, resolution dated 25.07.2009 Annexure I/20 was passed by the Board of Directors giving authority to its personnel to execute documents. In this term loan, the corporate debtor executed agreement of hypothecation dated 31.08.2009 Annexure I/21; supplementary agreement and agreement of guarantee, both of even date Annexure I/22 and I/23 respectively. Annexure I/25 is the corporate guarantee executed by M/s Rajit Milk Private Limited, dated 31.08.2009 executed by the

authorised Director of the said company vide resolution dated 25.07.2009 Annexure I/24.

7. Since the project was not finished and the production had not started and that the repayment of the loan was to begin in the year 2011, the corporate-debtor made a request for the restructuring of the total loan amount of ₹44.69 crores. This request of the corporate-debtor was considered by the petitioner Bank and the existing term loan of ₹47.16 crores was restructured and repayment schedule was changed and a fresh FITL of ₹6.23 crores was sanctioned and released to the corporate-debtor taking the overall financial facilities granted to the corporate debtor to the tune of ₹53.39 crores, vide sanction letter dated 30.03.2012 Annexure I/26. It is further stated that the term loan carried interest @ Base Rate + TP+5.00% i.e. 16.25% p.a. with monthly rests. The term loan was repayable in 108 monthly instalments of ₹0.4369 crores and repayment was to begin from April, 2013. There was a clause of enhanced interest @ 2% in case of default. The FITL had to be repaid in 84 equal monthly instalments starting from April, 2013. The terms and conditions were conveyed to the corporate-debtor vide sanction letter dated 30.03.2012. The respondent-corporate debtor executed FITL agreement; agreement of guarantee, both dated 31.03.2012 Annexure I/29. Fresh corporate guarantee was executed by M/s Rajit Milk Pvt. Ltd. dated 31.03.2012, Annexure I/32 through the authorised representative as per the resolution of the Board of Directors of the said company dated 30.03.2012 Annexure I/31.

8. The project had still not come into operation and the corporate debtor again requested for restructuring of the existing term loan of ₹47.16 crores in which the outstanding amount was to the tune of ₹48.21 crores as on

01.06.2013 apart from the existing FITL of ₹6.23 crores, in which outstanding amount as on 01.06.2013 became ₹6.87crores. The Bank restructured the loan and the repayment schedule with fresh FITL of ₹12.89 crores and released overall facilities to the corporate debtor to the tune of ₹66.28 crores vide sanction letter dated 31.12.2013 Annexure I/33. In this regard, the Board of Directors of the respondent company passed a resolution dated 31.12.2013, Annexure I/34. The corporate debtor executed supplementary agreement, FITL agreement, letter of undertaking, agreement of guarantee all dated 31.12.2013, which are from Annexure I/35 to Annexure I/38. M/s Rajit Milk Pvt.Ltd. also executed fresh guarantee deed Annexure I/40 on the basis of its fresh resolution dated 30.12.2013. M/s Rajit Power Ltd. and M/s PAR Chemical Pvt.Ltd. also executed agreement Annexure I/42 for pledge of the shares.

9. It is stated that to secure various term loans and FITL facilities sanctioned by the Financial Creditor, various immovable properties were equitably mortgaged with the Bank, particulars of which are given at Column No.1 of Part V of the application. These details include the residential property, agricultural land measuring 10 Biswa 14 Biswasi etc. Annexure I/4 is the certificate of charge registered with the ROC containing details of various properties. Annexure I/5 (colly) from page 140 to 306 are copies of various sale deeds and its translations in respect of which the equitable mortgage etc. were created. The corporate debtor also executed the documents of 1st charge on Hypothecation of machinery / equipments and other assets related to hydrogenation project installed/erected/constructed over leased Forest and Private land and all the Borrower's book debts, operating cash flows and all the

receivables and revenue of whatsoever nature and whenever arising, both present and future of the Project.

Hypothecation/assignment of or creation of charge on-

- all the rights, titles, interests, benefits, claims and demands whatsoever of the Borrower in the Project documents,
- all the rights, titles, interest, benefits, claims and demands whatsoever of the Borrower in any letter of credit, guarantee, performance bond provided by any party to the Project Documents and
- all Insurance Contracts/Insurance Proceeds.

10. The accounts of the corporate debtor became irregular and the accounts were classified as NPA on 19.02.2016. Thereafter, demand notice dated 08.03.2016 under Section 13(2) of SARFAESI Act, 2002 was issued to the corporate debtor as well as guarantors, demanding total of ₹75,04,04,961.91 as on 07.03.2016 which included interest upto 31.01.2016 and interest thereafter is required to be added. The petitioner bank also relied upon copies of the account statements of various accounts as per the Bankers Books Evidence Act, 1891, copies of which are attached at Annexure I/13 (colly). The petitioner bank also filed along with the petition the CIBIL Report Annexure I/9. The corporate debtor also executed balance and security confirmation letters of different dates acknowledging liability which are at Annexure I/43 from pages 723 to 757 of the paper book.

11. The demand notice dated 17.04.2017 was also sent which is at Annexure I/44 raising aforesaid default after the account was declared NPA.

12. Notice of this petition was issued to the respondent-corporate debtor and it filed the objections dated 22.11.2017. When the matter was listed on 23.11.2017 the contention raised on behalf of the corporate debtor was that there is no specific authorisation under the Code from the competent authority in favour of Mr. Viney Kumar Bhandari, Assistant General Manager of the Branch to file instant petition. Notice of this contention was given to the petitioner. Learned counsel for petitioner was directed to remove the defect within a period of 7 days.

13. The affidavit of Mr. Viney Kumar Bhandari dated 30.11.2017 was filed stating therein that vide recovery division circular No.9/2017 dated 21.02.2017 issued by the financial creditor, the Executive Director of the bank is the competent authority to initiate proceedings under the Code before the Tribunal where the balance outstanding amount is above ₹50 crores and upto ₹100 crores. With this affidavit copy of the said circular is attached at Annexure A-1. Since the amount in default against the corporate debtor was more than ₹50 crores, the matter was placed by the recovery division before the Executive Director of the Bank on 13.07.2017 who gave the permission to initiate insolvency resolution proceedings against the corporate debtor. The zonal office at Ludhiana which is the competent authority to issue directions to all the circle offices within its jurisdiction directed the concerned circle office in Ludhiana vide letter dated 17.07.2017 in reference to the letter dated 30.05.2017 seeking permission to file the application before the NCLT under the provisions of the Code against the respondent-corporate debtor, communicating the branch office that the Executive Director has permitted to take said action and file the application before the NCLT. Copy of the said

communication is at Annexure A-2. This instruction is issued by the zonal office of the Bank to the circle head at Ludhiana. Consequently the Chief Manager communicated to the Assistant General Manager of the Branch of the Bank in question, for taking up the matter for initiating the process before the NCLT. Copy of this letter dated 28.08.2017 is at Annexure A-3.

14. It is further stated in this affidavit that vide Law Division Circular No.6/2014 dated 03.01.2014 the officers of the rank of Assistant General Manager and above are also the competent authority to sanction / file / defend in the name of the Bank other matters before the NCLT, etc.

15. When the matter was listed on 12.12.2017, it was noticed that the affidavit of the authorised representative of the Bank was on an insufficiently stamped paper. Further, proper certificates with each statement of account to be certified under Bankers Books Evidence Act, 1891 were not annexed. Notice of this defect was issued to the petitioner and it was directed to remove the defects within a period of 7 days.

16. Mr. Viney Kumar Bhandari, Assistant General Manager of the Bank filed his affidavit dated 20.12.2017 along with fresh certificates in respect of each of the 5 accounts and in accordance with the Bankers Books Evidence Act, 1891 and also the fresh affidavit on a sufficiently stamped paper in support of the contents of the application. In this affidavit dated 20.12.2017 it is also stated that two winding up petitions bearing **CP No.67 of 2013 titled M/s HTP Energy India Pv.Ltd. Vs. M/s Rishi Ganga Power Corporation Ltd. and CP No.41 of 2014 titled Tata Capital Finance Ltd. Vs. M/s Rishi Ganga Power Corporation Ltd.** were pending in the Hon'ble High Court. It is explained that this fact could not be earlier mentioned in the main petition due to inadvertence.

17. It is pertinent to mention that the corporate debtor with the objections had attached the reply dated 01.05.2017 sent by it to the demand notice received from the bank and also the rejoinder thereto dated 12.05.2017 of the Bank. It was contended that these documents have been concealed by the bank in the petition. Even with the affidavit of Mr. Viney Kumar Bhandari, AGM of the Bank the said reply of the corporate debtor dated 01.05.2017 is attached as at Annexure A-3. Along with this affidavit vide diary No.2985 dated 20.12.2017 another affidavit of Mr.Bhandari, AGM dated 12.12.2017 was also filed on a proper stamp paper to remove the defect pointed out on this aspect. In the objection filed by the corporate debtor, a plea regarding pending winding up petitions against the corporate debtor in the Hon'ble High Court of Punjab and Haryana and the details of those winding up petitions were stated in the affidavit of Mr. Bhandari filed subsequently.

18. The corporate debtor/objector has assailed the competency of Assistant General Manager to file the petition on behalf of the Bank. It is stated that the Power of Attorney dated 30.12.1989 in favour of Mr.Bhandari is not only stale but the same is not supported by the resolution of Board of Directors of the Bank. Copy of two resolutions mentioned in the Power of Attorney have also not been annexed. There is no specific authority by the Bank in favour of Mr. Bhandari for initiating the proceedings under the Code. It is further stated that the power of attorney relied upon is 28 years old document and the then Board of Directors has been entirely challenged. Names of 11 members presently constituting the Board of Directors of the financial creditor have been given. It is also stated that none of the members of the special committee is now the member of the Board of Directors of the Bank. To support its contention

reference is made to the list of present Board of Directors Annexure R-1 downloaded on 08.11.2017.

19. It is pleaded that two winding up petitions are pending against corporate debtor and the status of those cases Annexure R-2 reveals that the said matters are still pending. It is further averred that the issue with regard to the maintainability of the petition under the Code on account of pendency of the winding up petitions has been referred to a larger bench of 3-Members in **Union Bank of India Vs. Era Infra Engineering Limited IB-190(Pb)/2017**. The 3-Members special bench was constituted by the Hon'ble President, NCLT vide order dated 13.9.2017. It is stated that in view of the aforesaid issues pending before the larger bench, the instant petition would not be maintainable. It was contended that the financial creditor is bound to disclose the factum of pendency of winding up petitions in view of sub-rule (2) of Rule 10 of the Rules.

20. It is also averred that in the affidavit in support of the application, Mr.Bhandari on one hand, states that Form 1 Part 1 to V of the petition are true to his knowledge and on the other, he states that the statements made in Form 1 Part 1 to V are based on information, in order to contend that in case the affidavit is defective, and thus cannot be accepted.

21. Another objection raised was that the affidavit of the authorised representative filed in support of the petition was insufficiently stamped but as already observed while narrating the facts of the case, the aforesaid defect has since been removed, though effect of the subject matter of the affidavit is to be discussed at a later stage.

22. It was further alleged that the financial creditor has placed on record old Memorandum and Articles of Association of the corporate debtor as

at Annexure I/2 and the registration certificate annexed thereto shows the registered office of the company located in the state of West Bengal. In the said documents, the authorised share capital of the company is said to be ₹5 crores divided into 50 lacs equity shares of ₹10/- each whereas in Part II of Form I, the authorised share capital of the company is stated to be ₹29 crores and the registered office of the company as situated at Ludhaina.

23. It is also averred that the statements of account filed by the financial creditor as at Annexure I/3 are not duly certified as per Bankers Books Evidence Act, 1891. Moreover, the financial creditor has charged 2% of the penal interest and has compounded the penal interest while calculating the outstanding amount which in violation of the judgement of the Hon'ble Supreme Court of India in **Central Bank of India Vs. Ravindra 2002(1) R.C.R.(Civil) 49**.

24. The financial creditor is also said to have concealed factum of sanction of further loan of ₹17 lacs to the corporate debtor on 24.07.2017 for removal of debris at the project site. In fact there was a cloud burst at the project site in Uttarakhand on 11.08.2016 which led to huge disaster to the project of the company. This project was fully insured with the insurance company and the insurance policy was in the joint names of the corporate debtor and the financial creditor. The claim has been filed with the insurance company and they are likely to receive the amount in due course. Even in 2013, there were unprecedented floods in Uttarakhand at the project site which was a national level natural calamity. These are the **force majeure** factors which were beyond the control of the corporate debtor and therefore, Section 56 of the Indian Contract Act is squarely applicable in such natural calamities. The

respondent has also filed sanction letter dated 24.07.2017 Annexure R-5 with regard to additional amount of ₹17 lacs along with copy of the insurance policy.

25. On merits it is stated that the corporate debtor has its hydro power project of 13.20 MW on Rishiganga River, at village Raini, Tehsil Joshimath, distt. Chamoli, Uttarakhand. On 11.08.2016, there was a huge cloud burst and due to explosive thunder of the clouds, the mountains and glaciers were broken and the whole power plant of the corporate debtor situated on river Rishiganga was buried in the debris so caused by the mountain and glacier fall. This project was insured with the Oriental Insurance Company Limited for a sum of ₹94 crores and the insurance policy was valid from 02.04.2016 to the midnight of 01.04.2017. A newspaper report in 'Hindustan' (Dehradun Edition) dated 12.08.2016 reported about the cloud burst and devastation of the project at the site.

26. It is further stated that there is no fault of the promoters/management in this natural calamity. Because of this natural calamity, even Punjab National Bank has been considering restructuring –cum-rehabilitation proposal of the company and has sanctioned adhoc help for the removal of debris so that the insurance company could assess the loss for insurance claim.

27. Reference is also made to the petition filed under 397-398 of the Companies Act, 1956 in CP No.40(ND)2013 before the Company Law Board at the instance of the minority shareholders which was filed in the year 2013 and the Company Law Board has ordered *status-quo* on immovable assets and shareholding.

28. At the end it is prayed that the petition may be rejected as not maintainable but it is asserted that the corporate debtor reserves the right to file reply on merits, if required.

29. I have heard learned counsel for parties and perused record quite extensively with their assistance. I would discuss the controversies arising during the course of arguments.

Maintainability of this petition filed through Mr.Viney Kumar Bhandari, Assistant General Manager, PNB

30. The petitioner bank has relied upon the General Power of Attorney dated 30.12.1989 Annexure I/1, executed by the Bank in favour of Mr.Viney Kumar Bhandari who is now the Assistant General Manager of the Branch. The salient features of the power of attorney as relevant to the controversy are as under: -

“(a) -----xx-----xx-----

(b) *To advance money of the said Bank on sufficient and reliable security or otherwise in compliance with the instructions and orders of the said Bank on such rates of interest and terms of payment as the said Bank may sanction.*

(c) *To take and use all lawful legal proceedings, actions and means for realising, recovering of debts, advances and claims due to the said Bank and also to institute and conduct, defend proceedings relating to the property, assets and affairs of the said Bank and realisation of its claims, demands or decrees. He shall have the power to take and use all legal proceedings necessary for the purpose of realisation of rents of property belonging to or taken on lease by the said Bank and also for the possession, ejectment of the tenants or the occupants thereof. He shall also have the power, in compliance with instructions received from the said Bank from time to time, to settle, compromise, compound, refer to arbitration, terminate, withdraw or abandon any suits, action or any proceedings and for all or any of the purposes aforesaid to execute such instruments and take such steps or do such things as may be necessary and expedient.*

(d) *Without prejudice to the general powers granted to the said attorney by the preceding sub-clause (c) regarding taking lawful proceedings for recovering debts and advances and claims due to the said Bank, for the purpose of realisation rents of property and for ejectment of tenants of*

the said Bank and in furtherance but not in limitation thereof, the said attorney shall have, in particular, the following powers and authorities to be exercised by him on behalf of the said Bank.

xxx

xxx

xxx

(iv) *To take criminal proceedings/action and **take insolvency and liquidation proceedings against the debtors** of the said Bank, to appear and act in a court of insolvency and Liquidation Judge and before the Official Receiver and Liquidator, to file claims prove debts of the said Bank in the insolvency and liquidation court and before the Official Receiver or Liquidator, to oppose discharge of the insolvent and to collect/receive dividend declared by the insolvency or liquidation court in respect of any insolvency or liquidation case.”*

31. Learned counsel for the respondent-corporate debtor referred to the judgement of Hon’ble National Company Law Appellate Tribunal in **Palogix Infrastructure Private Limited Vs. ICICI Bank Limited Company Appeal (AT) (Insol.) No.30 of 2017**. In that case ICICI Bank had filed petition under Section 7 of the Code through the Power of Attorney holder. Due to the dissenting view of the members of Kolkata Bench of the National Company Law Tribunal, the matter was referred to the Hon’ble President, NCLT for constituting Larger Bench in terms of Section 419 (5) of the Companies Act, 2013 for decision on the following questions: -

“Whether The Constituted Attorney authorised on 20/10/2014 to file suits and/or proceedings against the company for recovery of the amount and also to affirms plaints cum affidavits and other pleadings in any court of India including NCLT can file application for initiation of corporate insolvency process under section 7 of the Insolvency and Bankruptcy code 2016 without having specifically authorised to lodge Application/Petition under IBC 2016?”

32. By majority judgment, the Adjudicating Authority held that for initiation of the corporate insolvency resolution process there should be specific authorisation of the Power of Attorney Holder to initiate Corporate Insolvency Resolution Process in that regard and the bank having not done so, time was granted to rectify the defects.

33. The Hon'ble Appellate Tribunal in the facts of the said case observed that the financial creditor-bank had pleaded in the said case that by Board Resolutions dated 30.05.2002 and 30.10.2009, the Bank authorised its officers to do needful in the legal proceedings by and against the bank. It was, thus, observed that if general authorisation is made by any 'Financial Creditor' or 'Operational Creditor' or 'Corporate Applicant' in favour of its officers to do needful in legal proceedings by and against the 'Financial Creditor' / 'Operational Creditor' / 'Corporate Applicant', mere use of word 'Power of Attorney' while delegating such power will not take away the authority of such officer and for all purposes it is to be treated as an 'authorisation' by the 'Financial Creditor' / 'Operational Creditor' / 'Corporate Applicant' in favour of its officer, which can be delegated even by designation. In such case, officer delegated with power can claim to be the 'Authorised Representative' for the purpose of filing any application under Section 7 or Section 9 or Section 10 of "I&B" Code.

34. The Hon'ble Appellate Tribunal further held in **Palogix** case (supra) as under:-

"37. As per Entry 5 & 6 (Part I) of Form No.1, 'Authorised Representative' is required to write his name and address and position in relation to the 'Financial Creditor'/Bank. If there is any defect, in such case, an application under section 7 cannot be rejected and the applicant is to be granted seven days' time to produce the Board Resolution and remove the defect.

38. This apart, if an officer, such as senior Manager of a Bank has been authorised to grant loan, for recovery of loan or to initiate a proceeding for 'Corporate Insolvency Resolution Process' against the person who have taken loan, in such case the 'Corporate Debtor' cannot plead that the officer has power to sanction loan, but such officer has no power to recover the loan amount or to initiate 'Corporate Insolvency Resolution Process', in spite of default of debt.

39. If a plea is taken by the authorised officer that he was authorised to sanction loan and had done so, the application under section 7 cannot be rejected on the ground that no separate/specific authorisation letter has been issued by the 'Financial Creditor' in favour of such officer designate."

35. Learned counsel for respondent, however, contended vehemently that the then existing entire Board of Directors as constituted at the time of execution of the Power of Attorney has changed and the names of the present Board of Directors have been given in the pleadings. I do not find that the power of attorney which is executed by the Bank becomes redundant with the change of management or the Board of Directors. The most relevant provision with regard to the Power of Attorney is Section 85 of the Indian Evidence Act, 1872 which says that the Court shall presume that every document purporting to be a Power of Attorney and to have executed before and authenticated by a Notary Public or any Court, Judge, Magistrate, etc. was so executed and authenticated.

36. The learned counsel for the respondent further referred to the contents of the Power of Attorney, which shows that a Special Committee of the Board of Directors consisting of Salamat Ullah, Rashid Jilani & T.P.Ghorai was constituted under Board Resolution No.101 dated 28.07.1987, and that the Special Committee vide resolution No.1 dated 30.12.1989 appointed Shri Viney Kumar Bhandari as an attorney for and on behalf of the bank and delegated to him the powers mentioned in the power of attorney. The submission of the learned counsel was that both these resolutions i.e. of the Board and special committee have not been placed on record. I find this contention as untenable in view of the authenticity attached to the power of attorney for which Section

85 of the Indian Evidence Act attaches presumption and I find that no further authentication is required by way of producing resolutions referred to therein.

37. It is pertinent to mention that when the matter was listed on 23.11.2017, the contention on behalf of the respondent was that there is no specific authority in favour of Mr. Bhandari to file the petition under the Code. The petitioner's counsel was directed to respond to this contention within seven days.

38. Mr. Viney Kumar Bhandari filed the affidavit dated 30.11.2017 and attached the relevant documents therewith. It is stated that the financial creditor has issued circular No.9 of 2017 dated 21.02.2017, notifying the Competent Authority to initiate action under the Code. As per the said circular Annexure A-1 attached with the affidavit, the Executive Director of the Bank is competent to permit action under the Code in respect of the loans above ₹50 crores to ₹100 crores.

39. Annexure A-2 is the letter dated 17.07.2017 from the Zonal Office to the Circle Head of the bank at Ludhiana, in reference to office letter of the circle office dated 30.05.2017 recommending the permission to file the application before NCLT against the respondent under the Code. It was communicated that Recovery Division, vide letter dated 13.07.2017 has informed that the matter was placed before Executive Director who has accorded necessary approval for filing the application against the corporate debtor under the Code. The Chief Manager of the bank accordingly wrote to the Assistant General Manager of this Branch a letter dated 28.08.2017 Annexure A-3 attached with the affidavit communicating the aforesaid decision.

Learned counsel for respondent still submitted that copy of the order of the Executive Director of the bank who granted permission to initiate insolvency resolution process has not been filed. I am of the firm view that the communications having been officially received through proper channel do not require further proof.

40. Learned counsel for respondent, however, referred to the fresh affidavit dated 12.12.2017 furnished by Mr.Bhandari as earlier affidavit was insufficiently stamped, and submitted that Mr. Viney Kumar Bhandari, AGM has reiterated the facts originally stated by him in the earlier affidavit and still tried to derive authority to file petition based on the power of attorney but does not refer to the subsequent documents with regard to the permission from the Executive Director communicated to him through the Zonal Office and the Chief Manager. This is too technical an objection which would not have damaging impact on the application under Section 7 of the Code. The factum of the documents about the permission from the Executive Director and communication from the Zonal Office are the facts stated categorically in the affidavit dated 30.11.2017 of Mr.Viney Kumar Bhandari. In view of the above discussion it is held that the instant petition has been filed by the financial creditor through a competent person.

Whether the petitioner bank has established the existence of a default.

41. The financial creditor is required to move an application in Form No.1 as prescribed in Rule 4(1) of the Rules. Sub-section (3) of Section 7 of the Code reads as under: -

”(3) The financial creditor shall, along with the application furnish—

(a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;

(b) the name of the resolution professional proposed to act as an interim resolution professional; and

(c) any other information as may be specified by the Board.”

The information utility has not yet started functioning.

42. The record of evidence relied upon in support of the claim of default, has been given elaborately by the petitioner bank, as per requirement of Part V of application in Form No.1. All the details of the securities held by the financial creditor in the form of mortgaged deeds, hypothecation etc. have been given by the financial creditor. Reference to large number of documents i.e. applications for obtaining facilities, its extension, sanction letters from time to time and various documents executed by the respondent-corporate debtor, copies of the resolution(s) of the corporate debtor etc. has already been made. The financial creditor even filed original application (OA) before the Debt Recovery Tribunal, Chandigarh giving all the above details pertaining to the default committed by the corporate debtor. The financial creditor also initiated action against the corporate debtor under SARFAESI Act, 2002 and demand notice dated 08.03.2016 was issued under Section 13(2) of the said Act and copy of that notice is at Annexure I/7. The outstanding amount as on 31.01.2016 as per this notice was stated to be ₹75,04,04,961.91. The petitioner bank has also filed copy of CIBIL report Annexure I/9 supporting claim of the petitioner bank.

43. The most important aspect is that the respondent has not disputed execution of these documents of loan and the default committed by it. The excuse taken is that because of the natural calamity, the whole project has

turned into a debris and further that the project was insured and claim for the insurance has been filed. It was contented that this fact was not disclosed by the petitioner bank anywhere in the instant petition. Further, that there is no disclosure of the reply sent by the corporate debtor to the demand notice. I am of the view that the financial creditor is required to disclose the information as required in Form No.1 as prescribed in the Rules. Even otherwise no one knows when the insurance claim would be finalised. In any case, after the admission of the application, Interim Resolution Professional (IRP) or Resolution Professional (RP), as the case may be, continue to proceed with the remedy with regard to the claim for compensation with the insurance company in case the project was insured.

44. Learned counsel for the respondent-corporate debtor however contented that if there is total damage to the project which has turned into a debris, how it can be possible for the IRP or RP to manage the operations as a going concern. The above argument is noted to be simply rejected because it is not only that there should be plant & machinery existing at the site for enabling the Resolution Process, there are various other aspects of the operation of the corporate debtor including pursuing the remedy of getting compensation from the insurance company, calling of the expression of interest from the prospective resolution applicants, looking into various contracts which the corporate debtor has entered into and to take possession of day-to-day functioning etc. This Hydro Electric Project should be existing on a huge chunk of land which is to be properly managed. The loan was initially granted in the year 2006 and for inability of the corporate debtor to fulfil its obligation to repay the debt that the additional facilities were granted from time to time and the

corporate debtor has again taken shelter of the natural calamity which happened in 2016 to take its cause out of the purview of the provisions of the code which is impermissible.

45. It was contended for the respondent that additional facility of ₹17 lacs was also sanctioned by the Bank on 24.07.2017 for removal of debris, which fact was not disclosed by the petitioner bank. It is rightly contended by the learned counsel for the petitioner that the aforesaid fact was not relevant to be disclosed as this additional amount was not released because the corporate debtor did not fulfil its obligations in terms of the sanction order.

46. It was next contended by learned counsel for respondent that the financial creditor is bound to file copies of entries in the banker's book in accordance with Bankers Books Evidence Act, 1891. The financial creditor relied upon the statement of 5 accounts maintained under Bankers Books Evidence Act, 1891 as at Annexure I/3 (colly) but the requisite certificates as required by the Bankers Books Evidence Act have not been furnished. Learned counsel for respondent referred to sub-section (8) of Section 2 of the Bankers Books Evidence Act, 1891 which reads as under: -

“(8) “certified copy” means when the books of a bank,--

(a) are maintained in written form a copy of any entry in such books together with a certificate written at the foot of such copy that it is a true copy of such entry, that such entry is contained in one of the ordinary books of the bank and was made in the usual and ordinary course of business and that such book is still in the custody of the bank, and where the copy was obtained by a mechanical or other process which in itself ensured the accuracy of the copy, a further certificate to that effect, but where the book from which such copy was prepared has been destroyed in the usual course of the bank's business after the date on which the copy had been so prepared, a further certificate to that effect, each such certificate being dated and subscribed by the principal

accountant or manager of the bank with his name and official title; and

- (b) Consist of printouts of data stores in a floppy, disc, tape or any other electro-magnetic data storage device, a printout of such entry of a copy of such printout together with such statements certified in accordance with the provisions section 2-A;
- (c) A printout of any entry in the books of a bank stores in a micro film, magnetic tape or in any other form of mechanical or electronic data retrieval mechanism obtained by a mechanical or other process which in itself ensures the accuracy of such printout as a copy of such entry and such printout contains the certificate in accordance with the provisions of section 2-A.”

47. As per Section 2-A of Bankers Books Evidence Act, 1891 the printout of entry or a copy of printout is to be accommodated by the following namely, -

“(a) a certificate to the effect that it is a printout of such entry or a copy of such printout by the principal accountant or branch manager; and

(b) a certificate by a person in-charge of computer system containing a brief description of the computer system and the particulars of –

(A) the safeguards adopted by the system to ensure that data is entered or any other operation performed only by authorised persons;

(B) the safeguards adopted to prevent and detect unauthorised change of data;

(C) the safeguards available to retrieve data that is lost due to systemic failure or any other reasons;

(D) the manner in which data is transferred from the system to removable media like floppies, discs, tapes or other electro-magnetic data storage devices;

(E) the mode of verification in order to ensure that data has been accurately transferred to such removable media;

(F) the mode of identification of such data storage devices;

(G) the arrangements for the storage and custody of such storage devices;

(H) the safeguards to prevent and detect any tampering with the system; and

(I) any other factor which will vouch for the integrity and accuracy of the system.

(c) a further certificate from the person in-charge of the computer system to the effect that to the best of his knowledge and belief, such computer system operated properly at the

material time, he was provided with all the relevant data and the printout in question represents correctly, or is appropriately derived from, the relevant data.”

48. The learned counsel referred to certificates purportedly issued under the Bankers Books Evidence Act as attached with the additional affidavit dated 20.12.2017 of Mr. Viney Kumar Bhandari. It is submitted that the account numbers mentioned in these 5 certificates which are part of Annexure A-2 have been written with the pen and not typed whereas rest of the subject matter has been typed. It was contended that fresh statements of accounts with which these kind of certificates should have been filed instead of simply filing five sheets of certificates only. I am unable to agree with this submission either as the copies of account statements were already filed and those were only required to be duly certified.

49. Learned counsel for respondent also submitted that the main certificate has been signed by Mr. Viney Kumar Bhandari, Manager of the Branch and the certificate in terms of Section 2-A of Bankers Books Evidence Act is also signed by him and not by the computer in-charge. To repel this contention learned counsel for petitioner contended that there is no separate post of computer in-charge in this Branch and the overall in-charge of the entire record including computer system is with Mr. Viney Kumar Bhandari, Branch Manager. In view of the above, I hold that there is no such lacuna in the certificates issued under the Bankers Books Evidence Act.

50. Under sub-section (4) of Section 7 of the Code, the Adjudicating Authority has to ascertain the existence of a default from the record of information utility or on the basis of other evidence furnished by the financial

creditor. The corporate debtor having committed the default is not a disputed factor.

51. Learned counsel for the respondent, however, submitted that there are large number of entries at page 97, 111, 120, 130 and 137 and even on the dates prior thereto showing the penal interest is being capitalised. The learned counsel referred to the Judgement of Hon'ble Supreme Court in **Central Bank of India Vs. Ravindra 2002(1) SCC 367** to contend that the capitalisation of the penal interest is against the RBI guidelines and circulars which have statutory force and thus illegal. Hon'ble Supreme Court held that 'penal interest' has to be distinguished from the term 'interest'. It was also held that 'penal interest' is an extraordinary liability incurred by a debtor on account of his being a wrong-doer by having committed the wrong of not making the payment when it should have been made, in favour of the person wronged and it is neither related with nor limited to the damages suffered. While liability to pay interest is founded on the doctrine of compensation, penal interest is a penalty founded on the doctrine of penal action. It was further held that the penal interest can be charged only once for one period of default and therefore cannot be permitted to be capitalised.

52. Learned counsel for the financial creditor submits that the penal interest and the normal interest have been shown separately in the books of account and it cannot be contended that penal interest has been capitalized. I do not think that this aspect should detain the Adjudicating Authority for an elaborate discussion as the role of Adjudicating Authority is only to ascertain the existence of a default and not the exact amount. In case of admission of the petition and consequent appointment of IRP or RP, the financial creditor

has necessarily to file the claim which the Adjudicating Authority is to verify and the IRP or RP, as the case may be, shall obviously look into this aspect as to whether interest is being charged contrary to the principle laid down by the Hon'ble Supreme Court in the **Central Bank of India case (Supra)** and to determine the exact amount as per the binding law laid down by the Apex Court. In case any person is aggrieved by the view of the insolvency resolution process, the remedy lies under clause (c) of Section 60(5) of the Code which reads as under :-

“60(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of—

(a) ----

(b) ----

(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.”

53. I find in this case that the financial creditor has been able to show the existence of default committed by the respondent-corporate debtor on the basis of evidence furnished by the financial creditor. In **Ajay Aggarwal Vs. Central Bank of India Company Appeal (AT) (Insol.) No.180 of 2017** decided on 13.12.2017, it was held by the Hon'ble National Company Law Appellate Tribunal that mere mismatch of the figures will *ipso facto* not invalidate the order initiating corporate insolvency resolution process under Section 7 of the Code.

The effect of pendency of winding up petitions

54. The learned counsel for respondent referred to sub-rule (2) of Rule 10 of the Rules that an applicant shall immediately after becoming aware notify the Adjudicating Authority of any winding up petition presented against

the corporate debtor. This fact was highlighted by the respondent in the written reply. The financial creditor has explained the aforesaid aspect in the affidavit of the authorised representative dated 20.12.2017 that due to inadvertence this fact could not be mentioned in the main petition.

55. In any case it was contended by the learned counsel for petitioner that this fact has since come to the notice of the Adjudicating Authority the effect of the pendency of the winding up petition would be the moot question. Learned counsel for respondent, however, submitted that following questions are pending before the Full Bench of NCLT, New Delhi in **Union Bank of India Vs. Era Infra Engineering Limited CP (IB) 190(Pb)/2017: -**

1. *Whether the process under the Insolvency and Bankruptcy Code, 2016 can be triggered in the face of the pendency of the winding up petitions before the respective High Courts or it is to be considered as an independent process?*
2. *In case the process is considered to be not independent, whether the petition filed under the Code is required to be transferred to the concerned High Court which is having seisin over the winding up proceedings or await the outcome of the winding up proceedings by adjourning it sine die?*
3. *Whether the Code gives any room for discretion to be exercised for adjourning it sine die in view of the statutory mandate given under Section 7, 9 and 10 of the Code for expeditious disposal of cases by either admitting or rejecting it within the fixed time frame?*

4. *In case if the petition is adjourned sine die and if the winding up petition is dismissed or set aside in appeal subsequently, whether there is scope in such an eventuality for power of revival within the frame work of the Code conferred on this Tribunal?*

It was contended that in view of the above, the instant petition would not be maintainable.

56. I am of the view that every petition under the Code where such a question is raised cannot be deferred till the decision of the Full Bench. However, the Hon'ble Appellate Tribunal held in **Forech India Pvt. Ltd. Vs. Edelweiss Assets Reconstruction Company Ltd. & anr. Company Appeal (AT) (Insolvency) No.202 of 2017** decided on 23.11.2017 where similar question was raised, observed that admittedly no order of winding up has been passed against the corporate debtor by the Hon'ble High Court and no liquidation proceeding had been initiated. It was also held that in the absence of actual initiation of winding up proceedings against the corporate debtor, it is always open to the financial creditor to file an application for corporate insolvency resolution process against the corporate debtor. So this issue is held against the respondent-corporate debtor.

57. A plea was also raised in the objections that *status quo* order in a petition under Section 397-398 of the Companies Act, 1956 has been passed by the Company Law Board in a petition filed against the corporate debtor by the minority shareholders, but such an order shall have least effect to the instant proceedings in view of the over-riding effect of the provisions of the Code by virtue of Section 238 of the Code.

58. There is no dispute on merits about correctness of assertion with regard to authorised and Paid-up capital and the particulars of registered office of the company. So filing of old Registration Certificate and Memorandum of Association is not a significant factor.

59. The financial creditor has also proposed the name of the Resolution Professional to be appointed as Interim Resolution Professional and in this case the financial creditor has relied upon the written communication given in Form No.2 (Annexure-II) by Mr. Nipan Bansal, registered with IBBI. Mr. Nipan Bansal has stated that there is no disciplinary proceedings pending against him and he has also furnished all the required particulars in Form No.2. The office has also verified that Mr. Nipan Bansal has been granted IBBI Regn.No. No.IBBI/IPA-001/IP-P00039/2017-18/10100 which is currently valid.

60. In view of the above discussion, the instant petition which is found to be complete deserves to be admitted. The instant petition, therefore, is admitted declaring moratorium for prohibiting all of the following in terms of Section 14(1) of the Code: -

- (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;

(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.

61. It is further directed that the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period. The provisions of sub-section (1) shall however not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

62. That the order of moratorium shall have effect from the date of this order 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.

63. The matter be listed on 30.01.2018 for passing of the formal order of appointment of Interim Insolvency Resolution Professional with further directions. Copy of this order be communicated to both the parties.

Sd/-
(Justice R.P.Nagrath)
Member (Judicial)
Adjudicating Authority

Pronounced in
Open Court
January 25, 2018
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