

**NATIONAL COMPANY LAW TRIBUNAL
CHANDIGARH BENCH, CHANDIGARH**

CP (IB) NO. 127/Chd/Pb/2017

**Under Section 7 of the Insolvency
and Bankruptcy Code, 2016**

In the matter of: -

UCO Bank, having its H.O. at 10, B.T.
Maharaj Sarani, Kolkata-700001,
through its
Branch Office at R.K. Road, Industrial
Area A, Ludhiana.

....Petitioner-Financial Creditor

Versus

M/s. KKK Cotspin Pvt. Ltd., having its
registered office at 32, Netaji Nagar,
GT Road (West), Jalandhar Bye Pass,
Ludhiana 141008.

...Respondent-Corporate Debtor

Order delivered on: 25.01.2018

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

For the petitioner : Mr. R.S. Bhatia, Advocate.
For the respondent : Mr. Vikas Bali, Advocate.

ORDER

The petitioner-Bank has filed this petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity, the 'Code') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for short, the 'Rules') to initiate the insolvency resolution process against the respondent-corporate debtor. The petitioner-'financial creditor' was incorporated on 31.03.1970 under Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 and has its Head Office at Kolkata and Branch Office at Industrial Area-A, Ludhiana.

2. The instant petition has been filed by the bank through Mr. Jitin Sharma, Assistant General Manager of the Branch Office at Ludhiana on the

basis of Power of Attorney dated 13.04.2010 (Annexure A-1). The competent authority has also permitted the filing of the application under the provisions of the Code vide letter dated 08.09.2017 (Annexure A-2).

3. The respondent-company was incorporated on 18.04.2006 as per the certificate of incorporation issued by the Registrar of Companies, Punjab, H.P. and Chandigarh. The certificate of incorporation is annexed as at Annexure A-3 with Memorandum and Articles of Association. The registered office of the respondent-company is situated at Ludhiana in the State of Punjab and, therefore, the matter falls within the jurisdiction of this Tribunal. The authorised share capital of the company is ₹ 75,00,000 and paid up capital ₹73,26,140.

4. The facts of the case, briefly stated, are that the respondent-corporate debtor had been availing loan from the petitioner-bank since the year 2008 when the cash credit hypothecation limit of ₹172 lacs was sanctioned. The details of the facilities provided to the corporate-debtor, which were increased from time to time, are contained in the list at Annexure A-5. The limit was increased to ₹2.50 crores on 24.03.2008 and thereafter enhanced from time to time. The latest sanction was granted on 09.10.2015 which are (i) CC hypothecation of ₹2600 lacs, (ii) ILC/FLC DA/DP of ₹135 lacs, (iii) BG (Bank Guarantee) of ₹15 lacs and (iv) Term Loan ₹670 lacs. In this regard, the petitioner-bank has filed documents executed by the corporate debtor in the year 2014 and 2015.

5. As per column 5 of Part V of Form No. 1 of the Rules as prescribed under Rule 4(1) of the Rules, the requirement for the financial creditor is to file the latest and complete copies of financial contracts reflecting all the amendments and waivers upto date. It is stated that on 09.10.2015

when the financial creditor-bank accorded sanction (Annexure A-10) of credit limits by enhancing the earlier limit subject to fulfilment of the terms and conditions mentioned in the sanction letter. In this regard the corporate debtor executed the composition deed of hypothecation and hypothecation of the goods both dated 13.10.2015 annexed as Annexures A-11 and A-12, respectively to secure the cash credit limit. The documents i.e agreement for extension of charge by way of hypothecation of the current assets dated 19.09.2014 is at Annexure A-13; Deed of hypothecation and agreement of term loan of the even date are at Annexure 14 & 15. With regard to the sanction accorded on 09.10.2015, the corporate debtor had executed Demand Promissory Note dated 13.10.2015 in respect of an amount of ₹26 crores (Annexure A-17) and also Guarantee Deeds (Annexure A-18 & 19) both dated 13.10.2015.

6. In respect of various facilities, the financial creditor-bank has relied upon the copies of statement of accounts (Annexure A-21 to A-33) which are duly certified as per the Bankers' Books Evidence Act and the respective certificates are annexed with each of the accounts statement.

7. The amount in default as on 31.08.2017 is stated to be ₹36,62,48,202.41. The cash credit account and term loan account were opened by the petitioner-bank for which various documents were executed by the Corporate Debtor. Apart from this, various other accounts (11 in number) were opened with regard to the letters of credit for which the facility was availed by the corporate-debtor from the petitioner-bank and the amount of default has been given against each of these accounts with a total sum of ₹36,62,48,202.41. The petitioner-bank has also furnished the details of different amount against each of the facility including consolidated amount of

the principal under the letters of credit; penal interest and the total outstanding amount as on 31.08.2017.

8. The corporate debtor also mortgaged the immovable property with the bank to secure the loan for which the estimated value of the mortgaged property is given against Col.1 of Part V of the application. It is also stated that the value of Stock of corporate debtor as on 31.03.2016 is ₹30.01 crores which was also hypothecated with the bank. The latest valuation reports in respect of different properties have been annexed as Annexure A-6 (Colly). A-7 (Colly) is the copy of ROC charge created in respect of various properties. The Guarantee Deeds were also executed to secure the loan and the same have been annexed as Annexure A-18 and A-19 in order to bring support to the case of the financial creditor. The bank has also relied upon the CIBIL report dated 04.09.2017 (Annexure A-20) which has reported that the account of the corporate debtor became sub-standard.

9. Notice of this petition was sent to the respondent-corporate debtor which has filed reply to oppose the petition. It is admitted that the respondent-corporate debtor had been availing of the credit facilities from the petitioner-bank but it has also availed facility from the Allahabad Bank, Ludhiana. It is also admitted that the limits have been renewed from time to time, however on 25.08.2014, the financial creditor-bank issued a revalidation of sanction dated 13.05.2014 apart from the total loan of ₹28.30 crores. Copy of the sanction is at Annexure R-1.

10. On account of the recession in the market, the corporate debtor applied for enhancement of the limit as the company was facing financial crisis. Further that the petitioner-bank has admitted that there was no division of two immovable properties i.e. land measuring 6 Kanal 10 Marla and 875 sq. yards,

out of which the mortgage security was created. These properties are undivided, un-partitioned and joint properties. These mortgaged properties are in the name of Smt. Jyoti Gupta as a co-sharer but she is not a guarantor in the present case. Copy of the letter in this regard sent by the petitioner-Bank is Annexure R-2. The petitioner further renewed limits vide sanction letter dated 12.10.2015 (R-3). The Allahabad Bank in its letter has asked about the status of rest of the excess land meaning thereby whole of the land is joint and has not been partitioned.

11. It is further stated that the Allahabad bank has extended working capital of ₹6.10 crores. The petitioner-bank was not responding to the query raised by the Allahabad Bank for which the corporate debtor has suffered a lot and that the financial creditor has wrongly added the penal interest.

12. The respondent further stated that on 05.04.2016 the petitioner-bank itself got the valuation of the industrial property allegedly mortgaged with the bank, and it has been found that the total area of the property is 5500.66 sq. yards. This is undivided and a joint property out of which only 4807.50 sq. yard has been claimed by the petitioner-bank to be mortgaged with it. Annexure R-5 is the copy of valuation report which is dated 05.04.2016. Even out of aforesaid 4807.50 sq. yards of the land, 875 sq. yards is the property which has been leased out by the respondent-corporate debtor to Ms. Jyoti Gupta and Mr. Raman Gupta and, therefore, rest of the property measuring 3932.50 sq. yards is in favour of the corporate debtor. The other co-sharers in the said land are Ms. Usha Gupta, Ms. Shashi Gupta and Ms. Geeta Gupta. These owners/co-sharers filed a Civil Suit when the petitioner-bank and the Allahabad Bank tried to take over the possession of the entire property and the Civil Court has issued stay order in favour of Ms. Usha Gupta on

15.06.2017 restraining the defendants from alienating any specific portion of the property without seeking partition.

13. It is further alleged that the corporate debtor had written a letter dated 17.06.2016 to the petitioner bank that the restrictions of drawing power in the ratio of 60:40 against the stocks and books debts were adversely affecting the working of the company and made a request for relaxation of this condition. The corporate debtor had even written a letter to the petitioner-bank on 26.07.2016 that it was facing financial crunch and sought grant of ad hoc facility but that application is still pending. Instead of allowing the said application for ad hoc limit, the petitioner-bank stated that the account has been debited by ₹ 61,83,863/- having been paid to the SBOP on account of development of letter of credit.

14. On 05.09.2016, the corporate debtor again requested for grant of ad hoc limit and the bank vide its e-mail dated 01.09.2016 intimated that the ad hoc limit will be disbursed after regularization of the loan limit. However, the corporate debtor again requested for release of the ad hoc limit with a promise to pay within six months. Reference has also been made to so many other letters exchanged between the parties.

15. It is also stated that Allahabad Bank without obtaining permission from the petitioner-bank unilaterally issued demand notice under Section 13(2) of the SARFAESI Act by declaring the account as NPA on 29.10.2016. With regard to the different accounts relating to letters of credit, it is stated that the bank had opened the said accounts without obtaining consent of the company which has resulted in huge irregularities in CC account. Reference is made to various other letters exchanged between the parties and also Ms.

Jyoti Gupta which do not seem to be quite relevant for disposal of the instant petition.

16. It is, however, admitted that on 09.03.2017, the petitioner-bank issued a demand notice under Section 13 (2) of the SARFAESI Act copy of which was also addressed to Ms. Jyoti Gupta whereas she is neither a borrower nor a guarantor but the bank is claiming her to be a mortgagor. It is also admitted that the petitioner-bank thereafter issued a possession notice. In the notice, it has been highlighted that in the notices issued under Section 13 (2) & 13 (4) of the SARFAESI Act, the address of the corporate debtor are different. However, the petitioner-financial creditor initiated proceedings under Section 13 of the SARFAESI Act by filing application before the Additional Deputy Commissioner, Ludhiana but the said application was dismissed on 14.07.2017 (Annexure R-51) but the petitioner has concealed the aforesaid fact.

17. It is further alleged that there is a Civil Suit pending with regard to the mortgaged property in the Court at Ludhiana for which the stay order has been granted but the financial creditor is avoiding to appear in the said case. Reference is also made to SA No. 705/2017 filed by the corporate debtor against Allahabad Bank and another in which the notices have been issued to the Allahabad Bank and the petitioner-bank but the aforesaid fact has not been disclosed and the instant petition is said to have been filed after filing of the aforesaid matter.

18. In the same property i.e. registered office of the corporate debtor, there is one partnership firm Maheshwari Woollen Mills carrying on the business. The said partnership firm has also availed credit facilities from the petitioner-bank which has also proceeded against the said firm under the

SARFAESI Act. Maheshwari Woollen Mills approached the Debt Recovery Tribunal by filing SA No. 706/2017 in which the stand of the petitioner-financial creditor as per reply (Annexure R-52) is that the mortgaged property has already been sold and the sale proceeds have been credited in the accounts of the said debtor and possession handed over to the auction-purchaser whereas by filing this petition, the bank has sought appointment of liquidator so as to liquidate the assets of the company.

19. The above aspect in the preceding paragraphs needs to be disposed of right away. The learned counsel for the financial creditor Mr. Bhatia submitted that the aforesaid assertions having been made in the reply of the bank filed before the Debt Recovery Tribunal has come to his notice only recently but this assertion seems to have been made while typing the reply by cutting the relevant text from some other reply and pasted over the reply in this case. Having come to know of the aforesaid wrong assertion, the learned counsel submits that the bank would be filing necessary application for amendment of the reply in that regard. Otherwise, learned counsel for the petitioner-financial creditor submits that in reply to the said application on merits, no where was it alleged that the mortgaged property has been sold. Learned counsel made particular reference to para-46 of the reply that the bank has taken symbolic possession of the property on 01.06.2017 and the notice was to be published on 03.06.2017. The intimation of taking symbolic possession has also been sent to the said partnership firm on 03.06.2017. In view of the above, the aforesaid factor would not be a relevant aspect to be dealt with while adjudicating this petition though the above factors would reflect upon the casual approach of the bank officials while preparing the reply but

the remedy for that lies with the Debt Recovery Tribunal where the said application is pending.

20. Elaborate allegations have been made in the written reply that the petitioner-bank has not served any notice under Section 8 of the Code and that there is in fact a dispute between the parties by referring to the case law on the subject. These allegations are quite irrelevant in the matter of a petition filed at the instance of the financial creditor under section 7 of the Code.

21. It was also stated in para (i) of the Legal Submissions that the petition filed by the corporate debtor is not maintainable in view of the insolvency order dated 26.07.2017 already passed by the Hon'ble National Company Law Appellate Tribunal, New Delhi in C.A. No. (IB)-202(PB)/2017 filed by the Punjab National Bank-corporate debtor.

22. I need to dispose of the above allegation out rightly as the Punjab National Bank is not at all involved in this case. However, reference is made in support of this contention to the Order dated 26.07.2017 attached as at Annexure R-10 passed by the Hon'ble National Company Law Appellate Tribunal. Annexure R-10 attached with the reply is in fact a letter by the respondent-corporate debtor to UCO Bank-financial creditor dated 26.07.2016 to the effect that they have already filed an application for grant of ad hoc facility of ₹2 crores. It seems quite strange to make this kind of the averment which is factually not supported by documents.

23. Then reference is made to the provision of Section 11 of the Code which debars a petition by the corporate debtor for initiating the insolvency resolution process. It is not shown even remotely as to how this assertion is factually correct and attracted to the facts of this case. Even no argument was

raised on this allegation made unnecessarily. So this contention is discarded at the threshold.

24. I have heard the learned counsel for the parties and perused the record quite carefully.

25. The first aspect of the case requiring discussion is whether the petition has been filed by the financial creditor through a competent person. The Power of Attorney executed by the bank in favour of Mr. Jitin Sharma now Assistant General Manager of the Branch dated 20.02.2010 and notarised on 13.04.2010 is Annexure A-1. Sub-clause (c) of Clause 12 of the Power of Attorney authorises Mr. Jitin Sharma to do the following acts on behalf of the bank:-

“To decide, initiate, commence, prosecute, continue and defend all actions, suits or legal proceedings whether civil, criminal or revenue, including proceedings to procure or establish the bankruptcy or insolvency of any person or firm or liquidation or winding up of any companies, to compromise or refer to arbitration any claims or disputes in such actions, suits or proceedings or otherwise, to appoint solicitors, Advocates, Pleaders, Vakils and other legal agents; to make, sign, verify, execute plaints, petitions, written statements, Tabular statements, Vakalatnamas, Warrants or Attorney or any other papers expedient or necessary in the opinion of the said attorney to be made, signed, executed, verified, presented or filed in any court, tribunal, body or authority or anywhere as may be required.”

26. Even clause 10 of the Power of Attorney also authorises him to *“invest or advance money of the Bank, on security or otherwise, in accordance with the limits sanctioned by the Board of Directors of the Bank or by any authorised director, Managing Director or General Manager or other*

authorised officer of the Bank or within the discretionary powers allowed to the attorney on such terms and security or otherwise as approved.”

27. In the instant case, the Deputy Circle Head of the Bank issued specific authority letter in favour of Mr. Jitin Sharma authorising him to file petitioner under Section 7 of the Code in respect of the Corporate Debtor. In view of the above, it is held that the petition has been filed by the bank through a competent person.

28. It may be observed that a petition filed by the financial creditor has to be disposed of within the ambit and scope of Section 7 of the Code and nothing beyond that, like pendency of the Civil Suits in respect of the mortgaged property, filing of the applications before the Debt Recovery Tribunal which factors may be taken into consideration by the Interim Resolution Professional/Resolution Professional as the case may be while undertaking the resolution process in case the petition is admitted. The provisions of the code have overriding effect by virtue of Section 238 of the Code which reads as under: -

“The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.”

29. Under Section 7 (1) of the Code, the financial creditor can file an application for initiating the insolvency resolution process against the corporate debtor when the default has occurred. There is no dispute of the fact that the default has occurred though the respondent tried to justify the stand by contending that the petitioner did not provide for further facilities as needed. The petitioner-bank cannot be forced to grant further facilities if already there is default for the past many years.

30. As per sub-rule (2) of Section 7 of the code, an application can be filed by the financial creditor in the form prescribed which is Form 1 as per Rule 4 (1) of the Rules. Sub-rule (3) of Rule 4 of the Rules requires the copy of the application filed with the Adjudicating Authority to be despatched either by registered or speed post to the registered office of the Corporate Debtor. The petition was filed in the Tribunal on 23.10.2017 and copy of the petition along the entire paper book was sent by Speed Post on 23.10.2017 as per postal receipt at page 361 of the paper book. When the matter was listed on 05.12.2017, the learned petitioner's counsel filed tracking report showing the delivery of the postal article containing petition and paper book to the corporate debtor on 25.10.2017. The complete information as required in Form No. 1 against each column has been provided by the financial creditor.

31. The basic requirement which the financial creditor has to comply is given in sub-section (3) of Section 7 of the Code which 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.”*

32. The information utility has not yet started functioning and the Adjudicating Authority is basically to rely upon other record or evidence of default as specified under the Rules. The particulars of the record as specified have been given in separate parts of Form No. 1 which the financial creditor has furnished. As per the instructions contained in this Form, the corporate debtor is required to attach copies of documents referred to in the application,

written communication by the proposed Interim Resolution Professional as set out in Form 2 being the main requirement to be fulfilled.

33. There is abundant evidence in the nature of latest sanction letter, agreement of hypothecation, mortgage deed and execution of these documents is not a matter in dispute before this Tribunal. It was stated that the account of the corporate debtor was declared NPA on 31.01.2017 and thereafter the recall notice dated 02.02.2017 (Annexure A-8) was served upon the corporate debtor stating therein then outstanding amount to be ₹32,92,58,283.30 with further interest to be added w.e.f. 1.11.2016/01.01.2017. As such, the account of corporate debtor was declared NPA about one year ago. The petitioner started granting facilities to the corporate debtor since the year 2006 and the limits were being enhanced from time to time on the request of the corporate debtor. The financial creditor has also filed certificate of registration for modification of charge (Annexure A-7) issued by the Registrar of Companies, Chandigarh. This certificate mentions about various properties mortgaged and also that the working capital limit was increased from ₹ 19.55 crores to ₹ 26 crores and over-all exposure was enhanced to ₹ 34.20 crores. The latest balance confirmation letter which the corporate debtor executed in lieu of the loan from the financial creditor is dated 13.10.2015 (Annexure A-34) and in fact there is no denial of execution of these documents.

34. The bank has also relied upon the CIBIL report dated 04.09.2017 (Annexure A-20). The other important evidence to which there is presumption of law is attached, comprises of various statements of accounts (Annexure A-21 to A-33) for different accounts which are duly certified under the Bankers' Books Evidence Act, 1981 which should be enough for further accepting the

claim of the petitioner-financial creditor. In case, there is any issue with regard to the capitalization of the penal interest, the objection may be raised at the appropriate stage in case the petition is admitted and the Resolution Professional is appointed. The Interim Resolution Professional/Resolution Professional, as the case may be, shall be bound to see if the interest has been rightly added in accordance with the law as laid down by the Hon'ble Supreme Court. The certificate attached with these statements of accounts (Annexure A-21 to A-33) are at pages 246, 276, 284, 287, 290, 293, 296, 299, 302, 305, 308, 311 and 314. According to the learned counsel for the petitioner, for each letter of credit, a separate account was opened. The respondent has not been able to show any illegality in the aforesaid action of the bank. For opening of separate account for the letter of credit, it is quite obvious that no confirmation from the corporate debtor is required and the same is done in the normal course of the banking business. The factum of obtaining the letters of credit facilities has not been denied. So, there is abundant evidence in the case to show that the corporate debtor was in default at the time this petition was filed.

35. It is mandatory for the financial creditor to name the Resolution Professional, proposed to act as the Interim Resolution Professional as required by clause (b) of Section 7 (3) of the Code. Initially the bank proposed the name of CA Rajiv Khurana, registered Interim Resolution Professional with IBBI by filing written communication dated 24.08.2017 (Annexure A-4) in Form No. 2. It was stated by Mr. Khurana that he was currently serving as IRP/RP/liquidator in three proceedings. Looking into the aforesaid disclosure by Mr. Khurana, learned counsel for the financial creditor-bank sought time to file fresh communication.

36. Learned counsel for the petitioner has filed fresh written communication in Form No. 2 proposing the name of Mr. Vivek Kumar Arora registered RP with the IBBI for being appointed as IRP. Copy of this application was supplied to the learned counsel for the respondent. Mr. Vivek Kumar Arora has given all the necessary particulars required to be furnished in Form No.2. Mr. V.K. Arora is presently appointed only in one proceeding. On perusal of this written communication in Form No. 2, the same is found to be in order.

37. Sub-section (5) of Section 7 of the Code reads as under:-

(5) Where the Adjudicating Authority is satisfied that —

(a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or

(b) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:

Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.

38. With the above discussion, the application is found to be complete in all respects and further it has been found that the corporate debtor has committed default and that no disciplinary proceedings are pending against the proposed Resolution Professional as disclosed by him, the application deserves to be admitted.

39. In view of the above, the petition is admitted and moratorium in terms of Section 14(1) of the Code is declared prohibiting all of the following:-

- a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
- b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
- c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the 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.

40. It is further directed that the supply of essential goods or services to the Corporate Debtor as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 shall not be terminated or suspended or interrupted during moratorium period. This, however, shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

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

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

January 25, 2018
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