

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 319 of 2017

[Arising out of Order dated 16th November, 2017 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata in CP (IB) No. 543/KB/2017]

IN THE MATTER OF:

Mahesh Kumar Sureka

...Appellant

Vs.

SBER Bank & Ors.

...Respondents

Present: For Appellant: - Mr. S.N. Mukherjee, Senior Advocate with Mr. Pulkit Deora, Mr. Shaunak Mitra, Mr. Abishek Kumar, Mr. Abhimanyu Bhandari and Mr. Shivam Takiar, Advocates.

For Respondents: - Mr. Gyanendra Kumar, Ms. Anuradha Mukherjee, Ms. Shikha Tandon, Ms. Stuti Bhatnagar, Advocates.

Mr. Ajay Kumar Jain, Advocate for Respondent no.2.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

This appeal has been preferred by Mr. Mahesh Kumar Sureka, Director of Varrasana Ispat Limited ('Corporate Debtor') against the order dated 16th November, 2017 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata, whereby and whereunder the application preferred by SBER Bank ('Financial Creditor') under section 7 of the Insolvency and Bankruptcy Code, 2016

(hereinafter referred to as “I&B Code”) has been admitted, order of ‘Moratorium’ has been passed and ‘Interim Resolution Professional’ has been appointed with certain directions.

2. Learned counsel appearing on behalf of the Appellant submitted that the ‘Financial Creditor’ has already filed application under Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (DRT Act), which is pending.

3. It was further submitted that in respect of the ‘Corporate Debtor’ a meeting of the consortium members of Joint Lenders Forum (JLF) was convened on 30th July, 2014 consisting of Corporation Bank Limited, UCO Bank, Indian Overseas Bank, Central Bank of India and United Bank of India. The ‘Financial Creditors’ were informed about its intention to present a Corrective Action Plan (CAP) in view of the worsening scenario in the steel industry sector both globally as well as domestically which was adversely affecting the performance of the ‘Corporate Debtor’. In spite of the same, the ‘Financial Creditor’ approached the Adjudicating Authority under section 7, which has been admitted by the Adjudicating Authority without taking into consideration the aforesaid facts.

4. Learned counsel appearing on behalf of the Appellant submitted that there is no default as per sub-section (12) of Section 3 as the ‘Corporate Debtor’ was under restructuring and in view of the decision taken by the Joint Lenders Forum. But such submissions cannot be accepted, as it is not in dispute that there was debt and the ‘Corporate

Debtor' failed to pay the debt to the 'Financial Creditor' within the time, which resulted in default and giving rise to the proceeding under Section 19 of the DRT Act. So far as the decision of the Joint Lenders Forum is concerned, on such ground an application under Section 7 cannot be rejected, in view of decision of the Hon'ble Supreme Court in **"M/s. Innoventive Industries Ltd. Vs. ICICI Bank & Anr.— 2017 SCC OnLine SC 1025"**, wherein the Hon'ble Supreme Court observed and held:

"27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of "debt", we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a "claim" and for the meaning of "claim", we have to go back to Section 3(6) which defines "claim" to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A

distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5(21) means a claim in respect of provision of goods or services.

28. *When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor- it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which*

requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in part III, particulars of the financial debt in part IV and documents, records and evidence of default in part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the “debt”, which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the

applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.”

5. In this case, as default is apparent and the Adjudicating Authority is satisfied that a default has occurred, the application being complete, the Adjudicating Authority rightly admitted the application.

6. Next, it was contended that the Authorised Representative of the ‘Financial Creditor’ has not signed Form 1 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. However, it has been pointed out by the Respondent (‘Financial Creditor’) that Form 1 has been signed by the Chief Executive Officer of the Bank.

7. In **“Palogix Infrastructure Private Limited Vs. ICICI Bank Limited– Company Appeal (AT) (Insol.) No. 30 of 2017”**, this Appellate Tribunal by its judgment dated 20th September, 2017 held as follows:

“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 authorization letter has been issued by the 'Financial Creditor' in favour of such officer designate."*

8. In the present case, as the Chief Executive Officer of the Bank has signed Form 1, the application under Section 7 of the 'I&B Code' cannot

be rejected. We find no merit in this appeal. It is accordingly dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

(Justice S.J. Mukhopadhaya)
Chairperson

NEW DELHI

3rd April, 2018

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