NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 671 of 2019

[Arising out of Order dated 28th June, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata in CP (IB) No.1214/KB/2018]

IN THE MATTER OF:

State Bank of India,
Stressed Assets Management Branch – II,
1st Floor, Jeevan Deep Building,
1 Middleton Street, Kolkata – 700071. .... Appellant

Vs

Rohit Ferro Tech Limited,
35, Chittaranjan Avenue,
Kolkata – 700012. .... Respondent

Present:

For Appellant: **Mr. Arun Kathpalia, Senior Advocate with Ms. Misha, Mr. Nikhil Mathur, Ms. Swati Lal, Ms. Bani Brar and Mr. Ekalavya Dwivedi, Advocates.**

For Respondent: **Ms. Vanita Bhargava, Mr. Ajay Bhargava, Mr. Aseem Chaturvedi, Mr. Sabhyasachi Chaudhary, Mr. Tridip Bose and Ms. Maithili Mondra, Advocates.**

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

The State Bank of India - Appellant filed application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the **'I&B Code'**) for initiation of 'Corporate Insolvency Resolution Process' against M/s Rohit Ferro Tech Limited ('Corporate Debtor'). The Adjudicating Authority noted that there is debt payable by 'Corporate Debtor' and there is a default, but dismissed the application under Section 7 of the I&B code on the ground that the 'Circular' issued by the Reserve Bank of India dated 12th

February, 2018 to file 'Corporate Insolvency Resolution Process' has been declared to be *ultra vires* and illegal by Hon'ble Supreme Court in *Dharani Sugars and Chemicals Ltd. vs. Union of India and Ors. [Transfer Case (Civil) 66 of 2018]*, wherein the Apex Court held that: -

> *"For these reasons also, the impugned circular will have to be declared as ultra vires as a whole, and be declared to be of no effect in law. Consequently, all actions taken under the said circular, including actions by which the insolvency Code has been triggered must fall along with the said circular. As a result, all cases in which debtors have been proceeded against by financial creditors under section 7 of the Insolvency Code, only because of the operation of the impugned circular will be proceedings which, being faulted at the very inception, are declared to be non-est."*

2. The Adjudicating Authority has accepted that there is no dispute that debt is payable by the 'Corporate Debtor' and the 'Corporate Debtor' has defaulted, as evident from paragraph 2 of the impugned order dated 28th June, 2019. Therein the stand taken by the 'Corporate Debtor' has also been recorded, as quoted below: -

> *"2. The following facts are not in dispute:*
>
> *2.1 Under various loan agreement credit facilities, SBI granted and disbursed loan to the corporate debtor. The Corporate Debtor did not repay the loan as agreed and committed default in paying the sum. Its account became NPA. At the end of July, 2018, sum of Rs.1792,12,74,701/- is set to be due against the corporate debtor. Since the corporate debtor committed default in paying the*

debt. This application is filed to start CIRP of the corporate debtor.

2.2. Notice of the application is duly served. The corporate debtor appeared through one Mr. Samir Mukherjee, Manager (Legal). He filed affidavit-in-reply. Corporate Debtor challenged this proceeding on four grounds:

(i) Mr. Bishwatosh Misra, Assistant General Manager, Head Office, SBI is not properly authorized to initiate this proceeding under section 7 of I&B Code, 2016.

(ii) This proceeding is filed on the basis of Reserve Bank of India's circular dated 12.02.2018. Hon'ble Supreme Court in case of Dharani Sugars and Chemicals Ltd.-vs-Union of India & Ors. held the circular to be bad in law and declared that proceedings under I&B Code on the basis of that circular are non-est. They are to be disposed off.

(iii) Winding up petition of the corporate debtor is filed in the Hon'ble High Court and hence this parallel proceeding cannot be entertained.

(iv) Financial creditor did not produce certificate of default issued by Information Utility."

3. Learned Counsel for the Appellant submitted that the application under Section 7 was not filed pursuant to Reserve Bank of India 'Circular' dated 12th February, 2018. The said application was filed on 23rd August, 2018 much before the deadline of 180 days as prescribed under the 'Circular'. As per the 'Circular' of Reserve Bank of India, an application under Section 7 can be filed only on completion of the period of 180 days after 31st August, 2018.

4. The 'Circular' dated 12th February, 2018 issued by the Reserve Bank of India has been enclosed, the relevant portion of which is as follows: -

"Resolution of Stressed Assets – Revised Framework

1. *The Reserve Bank of India has issued various instructions aimed at resolution of stressed assets in the economy, including introduction of certain specific schemes at different points of time. In view of the enactment of the Insolvency and Bankruptcy Code, 2016 (IBC), it has been decided to substitute the existing guidelines with a harmonized and simplified generic framework for resolution of stressed assets. The details of the revised framework are elaborated in the following paragraphs.*

I. Revised Framework

A. <u>Early identification and reporting of stress</u>

2. *Lenders shall identify incipient stress in loan accounts, immediately on default, by classifying stressed assets as special mention accounts (SMA) as per the following categories:*

SMA Sub-categories	***Basis for classification – Principal or interest payment or any other amount wholly or partly overdue between***
SMA-0	*1-30 days*
SMA-1	*31-60 days*
SMA-2	*61-90 days*

3. *As provided in terms of the <u>circular DBS. OSMOS.No. 14703 / 33.01.001 / 2013-14 dated May 22, 2014</u> and subsequent amendments thereto, lenders shall report credit information,*

including classification of an account as SMA to Central Repository of Information on Large Credits (CRILC) on all borrower entities having aggregate exposure of Rs.50 million and above with them. The CRILC-Main Report will now be required to be submitted on a monthly basis effective April 1, 2018. In addition, the lenders shall report to CRILC, all borrower entities in default (with aggregate exposure of Rs.50 million and above), on a weekly basis, at the close of business on every Friday, or the preceding working day if Friday happens to be a holiday. The first such weekly report shall be submitted for the week ending February 23, 2018.

B. <u>Implementation of Resolution Plan</u>

4. All lenders must put in place Board-approved policies for resolution of stressed assets under this framework, including the timelines for resolution. As soon as there is a default in the borrower entity's account with any lender, all lenders – singly or jointly – shall initiate steps to cure the default. The resolution plan (RP) may involve any actions / plans/ reorganization including, but not limited to, regularization of the account by payment of all over dues by the borrower entity, sale of the exposures to other entities/ investors, change in ownership, or restructuring. The RP shall be clearly documented by all the lenders (even if there is no change in any terms and conditions).

C. <u>Implementation Conditions for RP</u>

5. A RP in respect of borrower entities to whom the lenders continue to have credit exposure, shall be

deemed to be 'implemented' only if the following conditions are met:

a. the borrower entity is no longer in default with any of the lenders;

b if the resolution involves restructuring; then

i. all related documentation, including execution of necessary agreements between lenders and borrower/ creation of security charge/ perfection of securities are completed by all lenders; and

ii. the new capital structure and/or changes in the terms of conditions of the existing loans get duly reflected in the books of all the lenders and the borrower.

6. Additionally, RPs involving restructuring/ change in ownership in respect of 'large' accounts (i.e., accounts where the aggregate exposure of lenders is Rs.1 billion and above), shall require independent credit evaluation (ICE) of the residual debt by credit rating agencies (CRAs) specifically authorized by the Reserve Bank for this purpose. While accounts with aggregate exposure of Rs.5 billion and above shall require two such ICEs, others shall require one ICE. Only such RPs which receive a credit opinion of RP4 or better for the residual debt from one or two CRAs, as the case may be, shall be considered for implementation. Further, ICEs shall be subject to the following:

(a) The CRAs shall be directly engaged by the lenders and the payment of fee for such assignments shall be made by the lenders.

(b) *If lenders obtain ICE from more than the required number of CRAs, all such ICE opinions shall be RP4 or better for the RP to be considered for implementation.*

7. *The above requirement of ICE shall be applicable to restructuring of all large accounts implemented from the date of this circular, even if the restructuring is carried out before the 'reference date' stipulated in paragraph 8 below.*

D. <u>Timelines for Large Accounts to be Referred under IBC</u>

8. *In respect of accounts with aggregate exposure of the lenders at Rs.20 billion and above, on or after March 1, 2018 ('reference date'), including accounts where resolution may have been initiated under any of the existing schemes as well as accounts classified as restructured standard assets which are currently in respective specified periods (as per the previous guidelines), RP shall be implemented as per the following timelines:*

   i) *If in default as on the reference date, then 180 days from the reference date.*

   ii) *If in default after the reference date, then 180 days from the date of first such default.*

9. *If a RP in respect of such large accounts is not implemented as per the timelines specified in paragraph 8, lenders shall file insolvency application, singly or jointly, under the insolvency and Bankruptcy Code (IBC) within 15 days from the expiry of the said timeline.*

10. *In respect of such large accounts, where a RP involving restructuring/change in ownership is implemented within the 180-day period, the*

account should not be in default at any point of time during the 'specified period', failing which the lenders shall file an insolvency application, singly or jointly, under the IBC within 15 days from the date of such default.

'Specified period' means the period from the date of implementation of RP up to the date by which at least 20 percent of the outstanding principal debt as per the RP and interest capitalization sanctioned as part of the restructuring, if any, is repaid.

Provided that the specified period cannot end before one year from the commencement of the first payment of interest or principal (whichever is later) on the credit facility with longest period of moratorium under the terms of RP.

11. *Any default in payment after the expiry of the specified period shall be reckoned as a fresh default for the purpose of this framework.*
12. *For other accounts with aggregate exposure of the lenders below Rs.20 billion and, at or above Rs.1 billion, the Reserve Bank intends to announce, over a two-year period, reference dates for implementing the RP to ensure calibrated, time-bound resolution of all such accounts in default.*
13. *It is, however, clarified that the said transition arrangement shall not be available for borrower entities in respect of which specific instructions have already been issued by the Reserve Bank to the banks for reference under IBC. Lenders shall continue to pursue such cases as per the earlier instructions."*

5. From the record, we find that the application under Section 7 of the I&B Code was not filed by the State Bank of India pursuant to 'Circular' dated 12th February, 2018 issued by the Reserve Bank of India.

6. In the present case, the 'Corporate Debtor' has not made any request for 'Restructuring' of its loan as per guidelines of the Reserve Bank of India 'Circular'. According to learned Counsel for the Appellant, as the 'Restructuring' was not permissible, there was no other option, but to file application under Section 7 for 'Resolution'.

7. It was submitted that the aforesaid fact has not been noticed nor dealt with by the Adjudicating Authority though it noticed that there is default committed by the 'Corporate Debtor'.

8. We have heard learned Counsel for the parties and perused the record.

9. In **"*Innoventive Industries Ltd. Vs. ICICI Bank and Anr. – (2018) 1 SCC 407*"**, 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."

10. In view of the aforesaid decision of the Hon'ble Supreme Court and there being debt payable by the 'Corporate Debtor' and having committed default, we hold that the Appellant has made out a case for initiation of 'Corporate Insolvency Resolution Process' against the 'Corporate Debtor'.

11. Petition under Section 7 of the I&B Code is to be considered by the Adjudicating Authority on its own merits taking into consideration the records and in absence of any evidence to show that the State Bank of India filed the application only because of the 'Circular' issued by Reserve Bank of India, it was not open to the Adjudicating Authority to reject the application.

12. In so far, the objection of the 'Corporate Debtor' that application was not filed by the Authorised person is concerned, we reject such submission,

as the application has been filed by an authorized Officer of the State Bank of India.

13. For the reasons aforesaid, we set-aside the impugned order dated 28th June, 2019 and remit the case to the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata with direction to admit the application under Section 7 after notice to the 'Corporate Debtor', so as to enable the 'Corporate Debtor' to settle the matter, if it so choses before admission. The Appeal is allowed with aforesaid directions. No costs.

[Justice S. J. Mukhopadhaya]
Chairperson

(Justice A.I.S. Cheema)
Member (Judicial)

(Kanthi Narahari)
Member (Technical)

NEW DELHI

20th September, 2019

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