BEFORE THE NATIONAL COMPANY LAW TRIBUNAL

BENGALURU BENCH

[COMPANY PETITION NO. 1000/2017]

DATED: SUNDAY THE 11th DAY OF FERBUARY 2017

IN THE MATTER OF INSOLVENCY AND BANKRUPTCY CODE, 2016

UNDER SECTION 7 READ WITH RULE 4 AND FORM 1

IN THE MATTER OF GREAT BANK OF INDIA LTD & ORS.

Great Bank of India Ltd & Ors. ……..Applicants/ Financial Creditors

Versus

Queen Flier Pvt Ltd and Ors. ……...Respondent/ Corporate Debtor

ORDER

1. This Application has been filed on behalf of Applicant under Section 7 read with Rule 4 and Form 1 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Code, 2016. The tribunal has granted jurisdiction to hear such applications by virtue of the Gazette published by the Government of India No. 04/0007/2003-16, dated 28th May, 2016.

2. The averments in the application are briefly described hereunder:-

a) Queen Flier Pvt Ltd a company incorporated under the Companies Act, 1956 having its registered and corporate offices at Bengaluru, India founded by one of the extravagant entrepreneurs in India popularly known as 'Lady Midas'. The company started business in airline industries for which company QFPL approached the Great Bank of India Ltd the major lender to the entrepreneur's to finance its purchasing requirement.

b) GBI took several guarantees from the Chairman and Managing Director; the bank also took collateral as guarantee from the group companies of QFPL to protect the loans granted by it. Apart from GBI, the company had obtained loans with 7 other banks to the tune of INR 10,000 crores.

c) The Letter of Sanction was issued by GBI to QFPL with loan facilities in such a way that the Cash Credit limit was INR 7,500 crores and the Letter of Credit limit was INR 2,500 crores. The agreed interest rate for the loan facility was 12% per annum.

d) The Company started to report huge losses. The company asked for release of the remaining INR 4,000 crores from GBI under its CC and LC limits. GBI rejected the request due to which company added to surmounting losses. Meanwhile, the company could not pay much of its interests during the moratorium period.

e) GBI issued a notice under section 13(2) of the SARFAESI Act, 2002 to QFPL asking it to pay the interest and also moved to DRT in Bengaluru against all the

corporate and non-corporate guarantors. Further. GBI filed an application before NCLT Bengaluru to initiate CIRP after complying with all the requirements under the Code.

3. The following issues have been considered by the learned Tribunal:-

   I. Whether there was a 'default'?

   II. Whether ongoing debt restructuring scheme is a proof that there is no default?

   III. Whether issuance of possession notices under SARFAESI Act is a bar to file application before NCLT?

   IV. Whether filing of application before DRT on same issue against the company and the guarantors is a bar to initiate proceedings under the code?

   V. Whether non-disbursement of entire loan amount as agreed in the sanction letter was fair on the part of the bank?

   VI. Whether there is a 'dispute' with regard to total amount to be paid?

4. We have heard the learned Counsels for both the Applicants and the Respondent. The Counsel for the Applicants submits that the recovery of the loan amount in question involves public interest (especially when one considers that the Great Bank of India is a public bank), a doubtful loan can be termed as default, there is demand for repayment of the ongoing loan and the company has failed to pay the interest amount on the principal amount as and when due, the Respondent qualifies for 'default' as defined in Section 7 (1) of the Insolvency and Bankruptcy Code, 2016 (from henceforth the Code or IBC), and is therefore liable to be subjected to Corporate Insolvency Resolution Proceedings (CIRP). The learned Counsel cited the case of *John Paterson and Co. (India) Ltd. v.*

Promod Kumar Jalan, [1979 SCC Online Cal. 242] in which the Court had ordered that where there is admission of indebtedness, the creditor had served a demand on the company which had neglected to pay the amount within three weeks thereafter, and the company was deemed to be unable to pay its debts. The Counsel further cited *Bank of India v. Tirupati Infra Projects Ltd.,* NCLT, New Delhi Principal Bench, C.P. No. IB – 104(PB)/2017, and argued that the Court just needs to determine whether default has occurred or not and it does not need to determine the exact amount of default to make the company eligible for CIRP, pointing out that just because the amount in the case at hand is disputed, does not mean that the amount has not defaulted.

5. On the above mention point the Respondent submits that the Applicant's contention is not liable for default under the aforementioned section of the Code. He has alleged that the Applicant has misused his authority to harass the company, and has overridden the principles of natural justice by subjecting the Respondent to unwarranted legal processes when it has not defaulted in the first place. Pointing out that Section 424 of the Companies Act, 2013 makes it mandatory for adjudicating authorities to follow the principles of natural justice, the Respondent contended that had the Applicant released the remainder of the loan amount, the company may have shown signs of revival.
6. Natural justice plays an important role in weeding out those who seek refuge in technicalities to hide their flaws by examining the situation under the light of an instinctive moral awareness, but the Court has to be equally attentive to the legal details involved. The learned Counsel for the Respondent could not satisfy the Court's curiosity regarding his stance on the issue of public involvement. The issue was no doubt raised by

him, but the Counsel has furnished no sound argument to specifically disprove the involvement of public interest, directing the Court's attention instead to the 'moral wrong' committed by the Applicant in bringing the Respondent to Court.

7. As far as the outcome of the Debt Restructuring Scheme (DRS) is concerned, Counsel for the Applicant submits that the DRS failed. The company has defaulted in paying back the money during the moratorium period, and it has shown no signs of revival. The cause of the failure is the default in making payments and the fact that the Respondent has dragged the debts owed to him by the financial creditors. The Counsel submits that this act of the company clearly shows that they had no means to pay the due debt, and therefore, the court proceedings and the issuing of notice become necessary for getting back the money due towards the company. Citing *Essar Steel India Ltd. v. Reserve Bank of India and Ors.*, Special Civil Application No. 12434/2017, the learned Counsel has argued that Debt Restructuring Process cannot be a factor to not commence CIRP and that even in the CIRP, the Restructuring Plan can be taken into consideration by the Committee of Creditors.
8. Adding to the point above, the Counsel further argued that the DRS was not a bar to initiate CIRP, and that there is no prohibition under the IBC on admitting an insolvency resolution application for a debtor who is undergoing a debt restructuring process. Again citing the Hon'ble Gujarat High Court's judgment in *Essar Steel India Ltd. v. Reserve Bank of India and Ors.*, Special Civil Application No. 12434/2017, the Counsel submitted that adjudicating authority should consider factual circumstances including the process of Debt Restructuring Process. DRS may be taken into consideration during

CIRP but it cannot bar the CIRP. In the present instance, he continues, the Respondent cannot stop the IRP merely because of the fact that DRS was ongoing. *M/s. Innoventive Industries Ltd v. ICICI Bank & Anr*., 2017 SCC Online SC 1025 was cited as an example. The learned Counsel has also submitted that a financial creditor was enough to initiate the CIRP, and the consent of the Joint Lenders' Forum was not required.

9. The learned Counsel for the Respondent relied on *Kingfisher Airlines Limited v. State Bank of India and Ors.*, 2014(3) AKR 817 to contest otherwise, arguing that the restructuring scheme was an ongoing scheme and had not been terminated then, and that the bank was not expected to approbate or reprobate in such a scenario. He also submitted that if the debt was bona fide disputed and the defence is a substantial one, the Court should not wind up the company, relying on *Madhusudan Gordhandas & Co. v. Madhu Woollen Industries* Pvt. Ltd (1971) 3 SCC 632 and *Niyogi Offset Printing Press Ltd. v. Doctor Morepen Limited*, (2007) 2 Comp LJ 548 Delhi.
10. Referring to the principles of natural justice, the Counsel also submitted that the filing of two similar cases will amount to double jeopardy which is against the principle of natural justice and will hamper the rights of a company which is already struggling to survive, and the Applicant's act of initiating the IRP reeked of malicious intent.
11. On this issue, the Counsel for the Respondent failed to on the principles of natural justice, and fails to intrigue the Court on the matter of details. However, the point highlighted by the respondent not be undermine as double jeopardy is of great relevance. Having taking note of that the court finds that the authorities submitted by the applicant was able to convince the court on the point its good in law and doesn't amount to double j the

Applicant has the back of a series of judgments that have dealt with that same concern, and which align with the reasoning of the Applicant. The presence of cases helps natural justice find utility in the real world, where it is not just an abstract exercise of man's moral maturity.

12. When questioned whether the application filed before NCLT would still be maintainable since possession notices to the Respondent under SARFAESI Act had already been issued, the Counsel for the Applicant submitted that in view of the overriding effect given by section 238, the initiation of proceeding under SARFAESI Act by the financial creditor is no bar for initiation of insolvency proceedings under the Bankruptcy Code. The learned Counsel further submitted that the pendency of any other proceedings in other forums is no bar for initiation of proceedings under the Insolvency and Bankruptcy Code unless there is an express provision in other enactments, which expressly overrides the provisions of Insolvency and Bankruptcy Code. There being an absence of such a provision, the Counsel argues that the application is maintainable before NCLT.
13. Counsel for the Respondent, on the other hand, submits that the application filed before NCLT is infructuous, because Section 63 of IBC states that no civil court or authority has jurisdiction to entertain any suit or proceedings in respect of any matter on which NCLT or NCLAT has jurisdiction, and even after knowing very well that IBC had come into force, and that only a single cause of action arises in the instant case, the Applicant still chose to tread the SARFAESI route.
14. During the course of the hearing the court took notice that the issue of non-disbursement of the entire loan amount spawned a contingent scenario of sorts. The Counsel for the

Respondent pleaded on more than one occasion that the non-availability of the remainder of the loan was the reason why the airline was struggling to revive. Had the loan amount been made available, the airline could have started churning out profits, because according to the Counsel, apart from this artificial crisis generated by the Applicant, the commercial climate had turned favourable, especially with the scrapping of the 5/20 rule, which would have enabled the Respondent to make up for the loss by flying international. The learned Counsel also pleaded that non-disbursement of loan went against the doctrine of promissory estoppel. He also cited the Supreme Court's judgment in *Gujarat State Financial Corporation Vs. M/s. Lotus Hotels Pvt. Ltd,* AIR 1983 SC 848, which stated that a statutory corporation should not act arbitrarily to harm the party with which it had entered into contract.

15. The learned Counsel for the Applicant submitted that under Section 3(12) of the IBC, "default" means non-payment of debt when whole or any part or instalment of the amount of the debt has become due and payable and is not repaid by the debtor or the Corporate Debtor, as the case may be, and as per sub-section (1) of Section 7 of the IBC, the trigger for filing of an application by a financial creditor before the Adjudicating Authority is when a default in respect of any financial debt has occurred. The default by the respondent in the interest payments, therefore, the learned Counsel submits, is the valid basis for the non-disbursement. The Counsel also argued that non-disbursement of funds was not a valid defence, citing *State Bank of India v. Essar Steels Ltd,* [2017] 84 taxmann.com 43 (NCLT - Ahd.)., in which a company had been incurring losses, and it

appeared that there was no scope that it could repay its debts in 25 years, assessing which the Court had ordered for the winding up of the Company.

16. The counsel on behalf of applicant has also submitted that it should be granted penal interest @24% p.a. with respect to the amount due as the Company failed in the payment of interest within stipulated period of time and that there is no dispute with regard to amount of debt defaulted in the present matter. The counsel relied upon the observation made by the Supreme Court in the case of Innoventive Industries Ltd. v. ICICI Bank Ltd. [2017] 84 taxmann.com 320/143 SCL 625 contending that dispute with regard to the amount of debt is of no concern of the adjudicating authority so long as the debt is "due". The Counsel further argued that in the case of an application by a Financial Creditor, this Bench need not go into the claims/counter claims in respect of penal interest charged and its compounding due to the fact that when the claim of the Financial Creditor is processed by the Resolution Professional, he/she will decide the validity or otherwise of the penal interest portion and if anybody is aggrieved for that they are statutorily entitled to file an appeal before this Bench and hence that issue is not gone into at this stage relying upon the judgement *Punjab & Sind Bank* v. *Allied Beverage Co. (P.) Ltd.* With respect to this contention, the counsel on behalf of respondent has submitted that there was no agreement as to the levy of penal interest and the same as per the unilateral direction of the Bank is not justified and the agreed rate of interest i.e. 12% p.a. should be applicable considering the fact that the Company has made some considerable repayments during DRS. The case of Jainath Prasad vs State of Bihar And Ors. (AIR 2000 Pat 11) was relied upon by the counsel to support this contention.

17. We Agree with the counsel of applicant that the application filed by Bank before NCLT is justifiable and legally admissible and that the bank is entitled to the loan amount to the extent it was disbursed and the interest thereupon @12%. Further, there is a no dispute with regard to total amount to be paid.
18. In the light of the above conclusions, all the impleading applications stand admitted.