IN THE NATIONAL COMPANY LAW TRIBUNAL, BENGALURU

BENGALURU BENCH

(Exercising the powers of Adjudicating Authority under the Insolvency and Bankruptcy Code, 2016)

CP/IB/1000/BB/2017

IN THE MATTER OF:

Great Bank of India Limited., Bengaluru

Bengaluru. …….. Petitioner/Financial Creditor

v.

Queen Flier Private Limited, Bengaluru

Bengaluru. …….. Respondent/Corporate Debtor

SECTION:

UNDER SECTION 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

Order delivered on 06.04.2017.

CORAM: ……. Member (Judicial), ……... Member (Technical)

For the Petitioner/Financial Creditor: _____

For the Respondent/Corporate Debtor: _____

JUDGMENT

1. The present Company petition bearing number CP/IB/1000/BB/2017 (hereinafter called **Company Petition**) is filed by Great Bank of India Limited (hereinafter called '**Bank/Petitioner'**), under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy Code Rules by inter-alia seeing to trigger Corporate

Insolvency Resolution Process (CIRP) in the matter of Queen Flier Private Limited (herein referred to as the '**Company**'). The petitioner claims itself to be a 'Financial Creditor' and has asserted that 'financial debt' for a sum of INR 120,000,000,000 (Rupees Twelve thousand crores) is due and payable as on 27.03.2017.

2. Queen Flier Private Limited is a private limited Company incorporated under Companies Act, 1956 on January 01, 2012 having its registered and corporate offices at Bengaluru, India. The founder of the Company wanted to enter into the Airline industry, and procured a company which was willing to sell to her. In order to meet the financial needs, the company approached the Petitioner Bank with a proposal to sanction INR 10,000 Crores. Towards the collateralized securities, the Bank sanctioned via a Cash Credit (CC) limit, INR 7,500 Crores and Letter of Credit (LC) limit of INR 2,500 crores with an agreed interest rate for the loan facility was 12% per annum. The Company had utilized INR 6000 Crores out of 10,000 Crores limit as on March 31st 2013. It had further repaid the interest, but subsequently profits began to dip and was unable to repay the interest.

3. On March 2014, the Company called on the consortium of 8 banks including the Applicant Bank and entered into a Debt Restructuring Scheme which included a moratorium on demand for two years. The Company pleaded for the release of the remaining funds towards to pay its suppliers and continue as a going concern. However, it was rejected.

4. Meanwhile change in aviation policy facilitated the revival of the Company which approached the Applicant Bank seeking the disbursement of the remaining sanctioned amount. However, the same was denied by latter which caused losses for the Company.

5. Once the moratorium period ended, the Company requested for an extension of one year which was granted by the Joint Lender Forum (JLF) *i.e.* until March 31, 2017.

6. On April 15, 2016 the Applicant Bank issued notice under Section 13(2) of the SARFAESI Act, 2002 and also moved against the Guarantors before the Debt Recovery Tribunal (DRT'). The Company being the actual borrower was also made a party to the proceedings

before the DRT. The other Creditor Banks also followed suit by issuing SARFAESI notices and initiating proceedings before the DRT.

7. Subsequently, the Applicant approached this Tribunal on March 27, 2017 seeking the initiation of insolvency proceedings against the Company by filing an application under Form-1 of the Insolvency and Bankruptcy (Application to Adjudicating authority) Rules, 2016 in accordance with Section 7 of the Insolvency and Bankruptcy Code, 2016. Hence, the present petition.

8. On perusal of the records submitted, and hearing the counsel for both parties, the following questions arise to determine the admissibility of the present application:

i. Whether there was a 'default' on part of the Respondent Company
ii. Whether the initiation of proceedings under the SARFAESI Act and the pendency of proceedings before the DRT acts as bar to initiate CIRP
iii. Whether the application can be admitted in light of the primary dispute raised regarding the non-disbursement of loan amount and the amount claimed by the Petitioner Bank.

9. The first objection raised by the learned counsel for the Respondent in this regard is that there is no existence of 'default' as there was no 'demand' from the Bank as per the Code. The loan granted was ongoing and not a term loan with a definite date for payment. Therefore, it would amount to default only if the Bank makes a 'demand' following which there is failure to pay the debt. It was further argued that in light of the on-going Debt Restructuring Scheme, the debt was not payable on the date of filing of application.

10. Learned counsel for the Petitioner argued that the Company had committed 'default' as under Section 7(1) of the Code and viable to be admitted. It was further submitted that the loans granted to the company have been treated as 'doubtful' in the books of the bank. Being a public Bank, there is public interest involved in recovering the money loaned out to the Respondent Company. He concluded by submitting that a Notice of demand was issued under the SARFAESI Act.

11. In regard to the above submissions made, we observe that the occurrence of 'default' is a primary condition to be satisfied in order to initiate CIRP. In order to understand the concept of default, a perusal of Section 3(12) of IBC is necessary,

> *"Default" means that there is non-payment of debt when whole or any part or instalment of the amount of debt has become due & payable and is not repaid by the debtor or corporate debtor."*

12. Here the phrase "due and payable" means that the debt is payable at the present moment, i.e. on the date of filing of Application. The Learned counsel for the Petitioner has neither addressed the present issue nor produced any document evidencing the date of default in repayment.

13. It is pertinent to note that the debt restructuring scheme was ongoing on the date of filing of application. The Petitioner had prematurely made a demand after granting an extension of one year to the Respondent Company. It was against decision of the JLF to issue notices under the SARFAESI Act before filing the present application. It is a violation of the JLF Agreement is prohibited by law and it is prima facie illegal owing to its statutory force except in the case of 'Wilful Default' by the borrower. Learned Counsel for the Respondent drew our attention to the definition of 'Wilful Default' as defined under the RBI ***Master Circular no. DBR.No.CID.BC.57/20.16.003/2014-15 clause 2.1.3*** dated July 1, 2014, and on perusal, we find Respondent Company is not covered within the ambit of the circular. Thus, there was no necessity for the Petitioner to violate the JLF agreement as there was no wilful default by the Respondent Company.

14. Therefore, we hold that the amount claimed by the Petitioner had not become 'due and payable' on the date of demand made and on the date of filing of the present application. The application is primarily fit to be rejected due to the absence of "default" as mandated under the Code.

15. The next question in this regard is whether the initiation of proceedings under the SARFAESI Act and the pendency of proceedings before the DRT acts as bar to initiate CIRP. The Learned Counsel for the Petitioner argues that such proceedings don't bar initiation of CIRP in light of the overriding effect of IBC.

16. The learned Counsel for the Respondent raised objections that admission of such application would violate the principle of *res judicata*. He further contends that the filing of the present application by the Petitioner amounts to "parallel proceedings" under Section 10 of the Civil Procedure Code (CPC) owing to the proceedings already initiated before the DRT.

17. On hearing Learned Counsels for both parties, we hold, the initiation of proceedings under the SARFAESI Act or the pendency of proceedings before the DRT is not a bar on commencing the 'Insolvency Resolution Process', as the overriding power is given under Section 238 of the Code.

18. The pendency of other proceedings towards the debts due by the Corporate Debtor is not a ground to reject this Application. The object of the Code is, no doubt, to protect genuine Corporate Debtors and to maximise their asset value and lay down a 'Resolution Plan' for revival of the Company. Incidentally, the process of formulating a Resolution Plan, a Moratorium is imposed which prohibits the initiation of other recovery proceedings. for a prescribed period of 180 days or for a further period of 90 days, if extended by the Adjudicating Authority.

19. Reliance can be placed on the Hon'ble Supreme Court's holding in the case of "***M/s. Innoventive Industries Ltd. Vs. ICICI Bank & Anr. 2017 SCC OnLine SC 1025"*** whereby, referring to different provisions of the 'I&B Code', it was observed:

> *"60. It is settled law that a consolidating and amending act like the present Central enactment forms a code complete in itself and is exhaustive of the matters dealt with therein…"*

20. The Hon'ble Supreme Court further proceeded to hold: -

"63. There can be no doubt, therefore, that the Code is a Parliamentary law that is an exhaustive code on the subject matter of insolvency in relation to corporate entities, and is made under Entry 9, List HI in the 7th Schedule which reads as under. -

"9. Bankruptcy and insolvency"

21. Thereby it is clear that the 'I&B Code' is a complete code in itself. Therefore, to say that the Application filed by a 'Financial Creditor' cannot be accepted in light of pending proceedings do not merit acceptance.

22. The third objection raised by the Respondent is that there exists a dispute in regard to the non-disbursement of entire loan amount and the excessive interest claimed by the Petitioner.

23. Learned counsel for the Petitioner argued that the concept of dispute does not apply to an application filed by a 'Financial Creditor' and pertains only to an application filed by an 'Operational Creditor' under the Code. Reliance was yet again placed on the case of "***M/s. Innoventive Industries Ltd. Vs. ICICI Bank & Anr. 2017 SCC OnLine SC 1025"*** as under:

"29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing – i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.

> *30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise."*

24. Learned counsel for the Petitioner further argued that Banks have an inherent right towards non-disbursement of entire loan sanction in case of persistent default. It was submitted that the disputed penal interest is levied in compliance with the ***Master Circular DBOD.No. Dir.BC.13/13.03.00/2014-15*** dated July 1, 2014 which reads as:

> "**8. Penal Rate of Interest**
>
> Banks are permitted to formulate a transparent policy for charging penal interest with the approval of their Board of Directors. However, in the case of loans to borrowers under priority sector, no penal interest should be charged for loans up to INR 25,000. Penal interest can be levied for reasons such as default in repayment, non-submission of financial statements, etc. However, the policy on penal interest should be governed by well-accepted principles of transparency, fairness, incentive to service the debt and due regard to genuine difficulties of customers."

25. Learned Counsel for the Respondent filed objection, that although the concept of dispute applies only to an application filed by an "Operational Creditor", the law reads that the application should not be admitted in light of genuine dispute regarding amount payable. Reliance was placed on ***M/s Mobilox Innovations Private Limited v. Kirusa Software Private Limited Civil Appeal No. 9405 of 2017 29*** whereby the Hon'ble Apex Court has observed that:

"40. .... Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application."

26. Learned counsel for the Respondent submits that the non-disbursement of the remaining sanctioned loan amount of INR 4000 Crores, amounts to grave violation of rights vested on the Company. He contended that the remaining amount sought to be disbursed by the Company could have highly aided in revival and restructuring of its Company and such denial amounts to violation of terms of Contract between the parties.

27. Learned Counsel for the Respondent submitted that the non-disbursement of part of the loan amount is a deficiency on part of the Banker on joint reading of the RBI circular on Consumer Cases and Section 12 of the Consumer Protection Act, 1986. A The decision the case of ***P.N. Prasad Vs. Union of India 1991 (1) CPR198*** by Hon'ble Hyderabad High Court was relied upon which shows that the Bank is liable to disburse the amount.

28. Learned counsel for the Respondent further submitted that the penal interest charged by the Petitioner Bank was exorbitantly high and was not agreed upon. Thus, the amount due was deemed to be lesser than INR 12,000 Crores as per the statement of accounts furnished.

29. The primary objection is that the statement of Bank accounts of the Respondent company doesn't match the figure of the alleged outstanding debt. In this regard, the Learned Counsel has drawn our attention to the detailed computation of interest payable produced as **Annexure I-A.** The relevant portion of the computation is produced as follows:

***** *All Computations are denominated in Crores (INR Currency)*

YEAR	**PARTICULARS**	**CALCULATION**	**TOTAL**
2012	Amount Sanctioned	7,500 CC+ 2500 LC	10,000
	Amount Granted	6,000	6,000
2012-13	Interest accrued and paid	6,000 x 12%	720
2013-14	Interest accrued but not paid due to stalling of funds by the Financial Creditor	6,000 x 12%	720
2014-17	Formulation of Debt Restructuring Scheme [Rate of Interest reduced to 10% pa]	(6,000 x 10%) x 1 yr. *Not paid due to deficiency of service on part of the Bank*: (6,000 x 10%) x 2 yrs.	600 1,200

Amount to be paid to the Bank is [*Principal Amount+ Interest*] = 6,000+1,920

= INR 7,920 Crores (Seven Thousand Nine hundred and twenty Crores)

Therefore, there is an additional 4,080 Crores in excess to the actual liability of the Respondent Company. It is evident that the quantum of liability claimed by the Petitioner Bank is deemed to be false and the same is highly disputed by the Learned Counsel for the Respondent.

30. The Learned counsel has drawn our attention to Para 8 of the RBI ***Master Circular DBOD.No. Dir.BC.13/13.03.00/2014-15,*** as quoted above, which shows that the interest levied by the Petitioner Bank is not fair due to failure to take into account the genuine difficulties of the customers

31. We find merits in the objections raised by the counsel for the Respondent. The Bank has levied a penal interest which is double the original agreed upon interest. Further, no detailed computation to substantiate as to why the bank has claimed INR 12,000 Crores has been submitted by the Learned Counsel for the Petitioner. We find the Petitioner bank is in Violation of the Bankers Book of Evidence Act, 1981, as the claim is made without due verification. Therefore, such evidence cannot be relied upon to initiate Corporate Insolvency Resolution Process and the claim so made by the Petitioner Bank is rejected in light of the principles of natural justice and basic principles of the insolvency proceedings as enshrined under the Code.

32. Therefore, in light of the above observations made, the present application is liable to be dismissed by observing that there has been no default committed, that there exists a primary dispute in regard to the very amount claimed and that no evidence has been produced to support the claim made.

33. Hence, the Application is dismissed due to devoid of any merits in light of the above observation. However, in light of the facts and circumstances of the instant case, no order as to cost.

(Member, Technical) **(Member, Judicial)**