IN THE NATIONAL COMPANY LAW TRIBUNAL AT
BENGALURU BENCH

CP/IB/1000/BB/2017
Under Section 7 of Insolvency & Bankruptcy Code, 2016
r/w Rule 4 of Insolvency and Bankruptcy
(Application to Adjudicating Authority) Rules, 2016

IN THE MATTER OF
GREAT BANK OF INDIA LTD
V/s
QUEEN FLIER PVT LTD

Coram : 1. Hon'ble Shri ____________________, Member Judicial
2. Hon'ble Smt. ____________________, Member Technical

Order delivered on ……..

Between:
Great Bank of India Ltd,
Bengaluru ***Financial Creditor/ Applicant***

And:

Queen Flier Pvt Ltd,
Bengaluru ***Corporate Debtor/ Respondent***

1. Present Insolvency Application CP/IB/1000/BB/2017 is filed by the Financial Creditor (Great Bank of India Ltd) against the Corporate Debtor (Queen Flier Pvt. Ltd.)

2. The Application has been filed u/s 7 of the of Insolvency & Bankruptcy Code, 2016 [hereinafter referred to as "The Code"] r/w Rule 4 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for triggering the Corporate

Insolvency Resolution Process [hereinafter referred to as “CIRP”] in respect of the Corporate Debtor being the Principle Borrower.

3. Brief facts of the case as per the Applicant Bank, Great Bank of India, is that there has been a ‘default’ by QFPL, the Corporate Debtor, in paying the principal amount and the interests accrued on it. It has been claimed that the principal amount disbursed as on date was INR 6,000 crores and the interest, including penal interest, at the rate of 24% per annum was INR 6,000 crores. In total, the principal and the interest due as per the bank stands at INR 12,000 crores.

4. **In pursuance of the application moved by the Financial Creditor, the Corporate Debtor (respondents) raised various objections stating:**
   i. This CIRP application is liable to be dismissed as ‘no default’ was committed as required under Section 7 of the code because there was no ‘demand’ from the bank for the repayment of the loan amount. The loan being ongoing, only if the bank makes a ‘demand’ for the purpose of the Code and there is a subsequent failure to pay the debt, it amounts to a default. Further, treating a loan as ‘doubtful’ is not sufficient to treat the same as ‘default’.
   ii. The present application was filed when the Debt Restructuring Scheme was still in force and is therefore against the objective of the RBI Notification on Framework for Revitalising Distressed Assets in the Economy – Guidelines on Joint Lenders’ Forum (JLF) and Corrective Action Plan (CAP)/ RBI/2013-14/503/ DBOD.BP.BC.No.97/21.04.132/2013-14). The Ld. Counsel for Respondents have

referred to the judgment of *Central Bank of India v. Ravindra* ((2002) 1 S.C.C. 367) stating that the RBI circulars issued under Sections 21, 35A and 35AB carry statutory force. Therefore, there is certainly no default as the bank was participating in the scheme.

iii. The present application is not maintainable as the bank has already initiated steps under The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 [hereinafter referred to as "SARFAESI Act"] by issuing possession notices to the company.

iv. Moreover, proceedings are already going on before the DRT regarding the same cause of action and acceptance of the same would amount to parallel proceedings which is prohibited under law on the principles of natural justice and more specifically, u/s 10 of the Code of Civil Procedure, 1908 (CPC), further amounting to forum shopping.

v. Bank cannot file this application and take advantage of its own mistake, because the delay in payment of the dues was because of the non-disbursement of the sanctioned loan amount by the bank.

vi. There is a dispute with regard to the amount of debt due and therefore the CIRP Application should not be accepted. The Ld. Counsel for the Respondents are claiming that interest should be calculated at the agreed rate of 12% and not 24%. They also claim that the company had made some repayments as per the scheme and hence the amount due is not INR 12,000 crores but much lower than that. It further submitted that the aspect of 'dispute' is not wholly irrelevant in case of a financial creditor and if there is a genuine dispute regarding the very amount itself to be paid then such application cannot be entertained.

5. **The averments made by the Applicants are briefly described hereunder:**

   i. The company had committed 'default' as required u/s 7(1) of the code, as interests due and the principal amount were not paid even after a demand notice was issued u/s 13(2) of the SARFAESI Act. Moreover, treating the loan as "doubtful" in the books of account is in itself a proof that default has occurred.

   ii. The Debt Restructuring Scheme is not a bar to initiate CIRP proceeding owing to the Non-Obstante clause u/s 238 of The Code. The scheme has clearly failed and the company is dragging in making the payments when it had no means to pay. Therefore, it would be unreasonable to hold the said scheme as a bar to initiate CIRP.

   iii. Both SARFAESI and IBC being special law, the latest Law would prevail over the former one and thus Possession notice under SAFAESI cannot be a bar to initiate CIRP proceedings. Moreover, the purposes of the two laws are so different in their ambit that it cannot amount to parallel proceedings.

   iv. The Ld. Counsel for the Applicants further argued that proceedings under NCLT and DRT would not amount to parallel proceedings as the remedy sought before the two are different. Moreover according to Section 424 of the Companies Act 2013, the NCLT is not bound by the provisions of CPC and thus, the question of violation of Section 10 does not arise.

   v. The Corporate debtor has time and again failed to pay the interest on the disbursed amount and thus the bank did not want to risk the funds of the public by further disbursing the loan amount. Moreover, even otherwise, enforcement of such individual rights and liabilities should be settled in a civil court, which the Respondents failed to approach and therefore, the non-disbursement cannot be taken as a defense.

vi. The Ld. Counsel for the Applicants argued that the bank was justified in charging penal interest on the defaulted amounts. Penal interest is always applicable if payments are not made on time. In any case, dispute on interest cannot go against the main application itself when the original claim is justifiable. Moreover, the bank being a financial creditor, the existence of a dispute is no bar to initiate CIRP proceedings as in the case of an operational creditor.

Our Observations are discussed in detail below:

6. Whether there is a Default: As per Section 3 (11) of The Code *"debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt.* The word "default" is defined under Section 3 (12) as *"default" means non-payment of debt when whole or any part or installment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be.* Section 5 (8) defines "*financial debt" as a debt along with interest, if any, which is disbursed against the consideration for the time value of money.*

7. Demand notice is served by an operational creditor to the corporate debtor demanding repayment of the operational debt. In *Kirusa Software Pvt.Ltd v. Mobilox Innovations*

Pvt. Ltd. (NCLAT), Company Appeal (AT) (Insolvency) 6 of 2017 – 24/05/2017 it was held that a demand notice under The Code is to be provided by an Operational Creditor and not by a Financial Creditor. The applicant being a Financial Creditor, it is not mandatory to issue a formal demand under The Code for the repayment of the loan. Therefore, the demand notice issued under Section 13(2) of the SARFAESI Act would satisfy the condition for the issuance of a demand notice. Hence, the non-payment of interest by the corporate debtor amounts to default.

8. Whether JLF proceedings is a bar to initiate CIRP : In *M/s Ruchi Soya Industries and Ors v. IDFC Bank Ltd. and Anr*., [2017] 201 Comp Cas 114 (Bom) It was held by the Bombay High Court that

> *"It is not in dispute that the petitioner bank is also bound by the statutory circulars issued by the Reserve Bank of India under the said provision……..The petitioner independently cannot adopt any proceedings during the ongoing process of rectification and restructuring being proceeded with or being under consideration by the said JLF……..In my view, the process of rectification and restructuring on one hand and the process of recovery by one of the members of the said JLF on the other hand cannot be permitted simultaneously and at the same time."*

9. The IBC is a complete code by itself. The court in *M/s Innoventive Industries v. ICICI Bank & Anr*,(NCLAT) Company Appeal (AT) (Insolvency) No. 1 & 2 of 2017 – 15/05/2017. held that

" Under Section 5 of Section 7, the 'adjudicating authority' is required to satisfy–

(a) Whether a default has occurred;

(b) Whether an application is complete; and

(c) Whether any disciplinary proceeding is against the proposed Insolvency Resolution Professional……

84. Beyond the aforesaid practice, the 'adjudicating authority' is not required to look into any other factor, including the question whether permission or consent has been obtained from one or other authority, including the JLF. Therefore, the contention of the petition that the Respondent has not obtained permission or consent of JLF to the present proceeding which will be adversely affect loan of other members cannot be accepted and fit to be rejected."

10. The same approach was observed in *Bank of Baroda v. Rotomac Global Pvt. Ltd. and Ors.*, (Allahabad Bench) C.P. Nos. (I.B.)70/ALD/2017 and (I.B.)71/ALD/2017 – 20/09/2017; *M/s Starlog Enterprises Limited v. ICICI Bank Limited* (NCLAT) CA (AT) (Insolvency) No. 5 of 2017- 24/05/2017;

11. The Non-Obstante clause under Sec 238 states that

    The provisions of IBC shall have effect, notwithstanding anything inconsistent other law for the time being in force or any instrument having effect by virtue of any such law.

Therefore, the Restructuring Scheme formulated by the JLF, cannot be a bar to initiate CIRP. RBI Circulars will not have any binding nature on the proceedings under IBC owing to the Non-Obstante clause of The Code.

12. It is pertinent to note, in *Ruchi Soya case*,(supra) the petition was filed under the provisions of the Companies Act,2013 and not under the IB Code, therefore the courts rationale cannot be applied to the present case. By virtue of this reasoning, the argument of the Corporate Debtor that the JLF agreement under the RBI guidelines is binding on the bank cannot be held valid. All the requirements to initiate CIRP have been fulfilled u/s 7 r/w Rule 4 and Form 1 and therefore, Debt Restructuring Scheme cannot bar initiation of CIRP.

13. Further, the position of the code is well settled with respect to its applicability over other special laws like the SARFAESI and RDDBFI Act. It is pertinent to note the observations of the Apex Court in the *Innoventive Industries v. ICICI Bank and Ors. AIR 2017 SC 4084* that

    "*The non obstante clause in the widest term possible is contained in Section 238 of the Code so that any right of the perpetrator under any other law cannot come in the way of the code*".

14. It should be noted that when there are two special statutes, the latter will normally prevail over the former as held by our Hon'ble Apex Court *in Allahabad Bank Vs. Canara Bank (2000) 4 SCC 406*.

15. The proceedings and the remedies under all the three enactments viz. SARFAESI Act, RDDBFI Act and The Code are different in their ambit, and provisions of one are not inconsistent with the other. Where the remedy under the SARFAESI Act is for recovery of the secured debt by minimal intervention of the Court, the remedy under RDDBFI Act is recovery of the debt by the bank by way of proceeding against the debtor. On the other hand, The Code provides for securing the assets of the debtors and to ascertain their liability for revival of a company or for a speedy liquidation.

16. On the contrary, if the application u/s 7 of the Code is not accepted then, the very purpose of enacting the Code which primarily ensures protection of all the creditors and not only the creditor(s) making the application will fail. The import as well as the significance of the Code is that other creditors should also be provided an equitable option to assume and/or undertake due legal course for redressal under some other statute. Furthermore, if CIRP can only be initiated after the contemplation of proceedings under other Courts/Tribunals such as DRT, it would frustrate the very essence and spirit of The Code which is to ensure quick resolution of insolvency matters.

17. Moreover, as held by the Chennai Bench of this Tribunal in *Indian Bank v. Infinitas Energy Solutions Pvt. Ltd., C.P. 558/(IB)/CB/2017*: -

> "*If the reasoning of the learned counsel for the respondent, that a concurrent proceeding before DRT and NCLT is abuse of process of law, are to be affirmed, then a piquant situation would be permitted where an*

> *Adjudicating Authority, exclusively created by the legislature to decide insolvency matters filed by the Financial/Operational Creditors would have to await decisions of other tribunals, thus frustrating the very purpose of parliamentary intention at quick resolution of insolvency matters.*"

The same approach was observed in *In Re: Brilliant Alloys Pvt. Ltd., C.P. /582/(IB)/CB/2017*

18. Therefore, an issuance of possession notices u/s 13(4) of the SARFAESI Act is not a bar to file applications for initiating CIRP under The Code. Moreover, the enactments being independent of each other, there is no scope for a bar to exist in order to initiate CIRP under The Code. Similarly, the ongoing proceedings under the DRT instituted under the RDDBFI Act, is no bar to initiate CIRP under The Code.

19. Non-disbursement of entire loan amount: CIRP can be initiated, once the default as required under The Code has occurred. The obligation of the Corporate Debtor is unconditional and not dependent upon infusing of funds by the creditors to Corporate Debtor. This was observed in *Innoventive Industries v. ICICI Bank and Ors (Supra).*

20. In the instant case, the non-disbursement of the sanctioned loan amount cannot be taken as a defence for non-payment of the dues owed by the Corporate Debtor especially when the reason for the non-disbursement was the persistent failure on the part of the Corporate Debtor to pay the interest, keeping in mind the interest of the public and their funds.

21. Existence of “dispute” is irrelevant in the instant case. There is no legal requirement that the “debt” must be certain. If dues as regards principal amount stand admitted, fact that there is a dispute as to existence of rate of interest payable would not result in dismissal of winding up petition. This approach has been taken in *Vijay Industries v. NATL Technologies Ltd*., (2009) 3 S.C.C. 527; *Packmasters Containers P. Ltd. v. Rayalaseema Commodities Ltd.* [2013] 176 Com Cases (Mad); *Thazhathe Purayil Sarabi v. Union of India* (2009) 7 S.C.C. 372.

22. In *Innoventive case* (supra) it has been held that

> “*Under Section 7 neither notice of demand nor a notice of dispute is relevant whereas under Sections 8 and 9 notice of demand and notice of dispute become relevant both for the purposes of admission as well as for and rejection.”*

23. Therefore, GBI being a financial creditor, it is immaterial whether there exist a “dispute” or not as the application for CIRP under section 7 of the IBC cannot be refused on the ground that there exists a dispute regarding the interest amount to be paid.

24. Thus, observing the facts of the case it may be noted that the financial strength of the company is now too feeble to rejuvenate, owing to several fallacious business decisions by the management of the company and unfavourable government policies. Moreover, despite the bank giving enough opportunities to the company to revive and make

repayment of the defaulted loan, it has failed to show any signs of improvement. Hence, the Adjudicating Authority believes that any further perpetuation of the business will only push it towards a debt trap.

25. Moreover, as has been stated in *Standard Chartered Bank and Ors. v. Essar Steel India Limited*, (Ahmedabad Bench) C.P.No.(I.B)39/7/NCLT/AHM/2017, initiation of CIRP cannot be construed as putting an end to the Debt Restructuring Process which can be taken up by the Committee of Creditors while formulating the Resolution Plan. Thus, if the creditors wish to continue with the restructuring scheme the same can be done under The Code. The objective of The Code was to bring all laws relating to Restructuring, Insolvency and Liquidation under one Statute.

26. We thus conclude that, in the aforesaid facts, provisions of the IBC, taking a practical approach considering the financial position of the company and the large amount of public funds involved, balancing the interest of all the stakeholders including the financial creditors, to meet the ends of justice, we hereby accept the Application for Corporate Insolvency Resolution Process as submitted by the Applicant Bank in the petition bearing No. CP/IB/1000/BB/2017 with the following directions:

a) We hereby appoint Mr. ………as Interim Resolution Professional to carry the functions as mentioned under The Code.

b) We hereby declare Moratorium under Section 14 which shall have effect from the present date till the completion of the CIRP.

c) We hereby stay the proceedings filed against the Corporate Debtor for the recovery and the enforcement of the secured interest taken under the provisions of the SARFAESI and the RDDBFI Act.

d) We hereby direct that the public announcement of CIRP be made immediately as specified under Section 13 of the code and calling for the submission of the claims under section 15 of the code.

(XYZ)	(ABC)
MEMBER, TECHNICAL	MEMBER, JUDICIAL