

**IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH**

CP/IB/1000/BB/2017

U/s. 7 of Insolvency & Bankruptcy Code, 2016
r/w Rule 4 of Insolvency & Bankruptcy
(Application to Adjudicating Authority) Rules, 2016

IN THE MATTER OF

GREAT BANK OF INDIA LTD. Vs. QUEEN FLIER PVT. LTD.

Coram: Hon'ble X, Member (Judicial)

Hon'ble Y, Member (Technical)

Order delivered on **dated 6th April 2017**

For the Applicant: Mr. S, Advocate.

For the Respondent: Mr. D, Advocate.

Great Bank of India Ltd., Bengaluru

.....Applicant

Versus

Queen Flier Pvt. Ltd., Bengaluru

.....Respondent

ORDER

1. This application was submitted before the NCLT on 27th March, 2017 on Form No. 1 in the capacity of "**Financial Creditor**", u/s.7 of the Insolvency & Bankruptcy Code 2016 (IB Code) r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 with a prayer to initiate Corporate Insolvency Resolution Process in respect of the Respondent.

2. The facts of the case in brief are as follows:

2.1. The Queen Flier Pvt. Ltd., incorporated under Companies Act, 1956, having its registered office at Bengaluru, entered into the airline industry and approached the Applicant for a loan of INR 10,000 Crores (Rupees Ten Thousand Crores Only). Pursuant to such request an on-going loan of INR 7,500 Crores (Rupees Seven Thousand Five Hundred Crores Only) and INR 2,500 Crores (Rupees Two Thousand Five Hundred Crores Only) as CC & LC limits respectively @ 12% p.a. was sanctioned on April 01, 2012 payable on demand with additional INR 1,000 crores (Rupees One Thousand Crores Only) from seven other Banks.

2.2. Additionally, the credit facility was secured by the guarantees from the CMD of the Corporate Debtor i.e., Lady Midas, on her most valuable properties; and collateral as guarantee from the other group Companies and the directors of the Respondent gave collaterals on their personal properties.

2.3. The Company initially earned profits but later on incurred losses due to the adverse competition and reduction of the tax depreciation regime. Subsequently, the Respondent was unable to repay interest as per the agreed terms of Loan agreement. Consequentially, the Bank stalled releasing funds after disbursing INR 6,000 crores (Rupees Six Thousand Crores Only), obstructing the company from running its business.

2.4. Subsequently, Respondent approached consortium of 8 Banks of which the Applicant was the lead Bank. In March, 2014 the Banks agreed for debt restructuring with moratorium of 2 years on loan demand. Post expiry of scheme in March, 2016, the consortium or the Joint Lenders Forum (JLF) met to decide the future course of action; thereby observing that the Respondent could have revived if the funds been disbursed.

Additionally, an extension of 1 year was granted on request of the Corporate Debtor in JLF.

2.5. The Applicant issued a Demand Notice dated April 15, 2016 u/s. 13(2) of SARFAESI Act, to which the Respondent objected; but the Applicant did not reply and on expiry of Demand Notice issued Possession Notices u/s. 13(4) of the Act after taking possession of the properties.

2.6. The other Banks also issued Demand Notices for their dues. Interestingly, the Applicant also moved the Debt Recovery Tribunal (DRT), Bengaluru against all the corporate and non-corporate guarantors claiming payment of dues of the Respondent.

3. The following issues were considered by the Tribunal:-

- I. Whether there is a Default under the IB Code?
 - II. Whether the ongoing Debt Restructuring Scheme is a Proof that there is no Default?
 - III. Whether the issuance of possession notices under the SARFAESI Act is a bar to file application before NCLT?
 - IV. Whether the filing of an application before the DRT on same issue against the company and the guarantors is a bar to initiate proceedings under the IB Code?
 - V. Whether non-disbursement of entire loan amount as agreed in the sanction letter was fair on part of the Bank?
 - VI. Whether there is a dispute with regard to the total amount to be paid?
4. The learned Counsel for the Applicant contended that the application was maintainable on grounds that Applicant being Financial Creditor u/s. 5(7) of the IB Code and the debt being due and payable, has not been discharged by the Respondent thereby qualifying to be a default as u/s. 3(12) of the IB Code. Placing reliance on ***Bank of India v. Varia Engineering***

Works Pvt. Ltd., C.P. (I.B) No.149/7/NCLT/AHM/2017, it was submitted that the notice served u/s. 13(2) of the SARFAESI Act evidences a demand for discharging dues. The non-payment of which was a default; creating a due and payable debt. The Respondent's failure to pay the due and payable debt has caused a default u/s. 3(12) of the IB Code.

5. The counsel for Applicant further relied upon the RBI Master Circular, Management of Advances and submitted that the restructuring of the debt takes place post default and classification of account as doubtful. The objective of CDR is to minimize the losses of the company and revive it from the losses occurred; as held in the *Deutsche Trustee Co. Ltd. v. Tulip Telecom Ltd., (2015) 188 Comp Cas 430*. Since, the Respondent was undergoing restructuring and it had breached the conditions of CDR by not paying due interest amount, the CDR itself serves as proof of existing default.
6. The Applicant then relied upon *M/s. Innoventive Industries Ltd. v. ICICI Bank & Anr., (2018) 1 SCC 407*, wherein the Apex Court held that the key role of the Adjudicating Authority is to determine existence of a default for admitting an application u/s. 7 of the IB Code; and that the said application can be admitted the moment such default is ascertained.
7. The Counsel for the Respondent vehemently argued against the maintainability of the present application on grounds of absence of default as debt was not due and payable because the restructuring was ongoing. The Respondent cited *Sudhir Shantilal Mehta v. Central Bureau of Investigation, (2009) 8 SCC 1* and *IDFC Bank Ltd. v. Ruchi Soya Industries Ltd., (2017) 201 Comp Cas 114*, and submitted that since the RBI guidelines are mandatory to be followed by the Banks, the CDR scheme and JLF proceedings are binding on the member Banks; thereby contending that the consortium of Banks itself agreed to restructure the debts of Respondent in March 2014 by implementing the scheme for 2 years after expiry of the

same 1 year extension was granted by JLF making the debt due and payable only after March 31, 2017. Therefore, there cannot be a default u/s. 3(12) of the IB Code before the expiry of the same agreed period.

8. Additionally, the Counsel relied on *Kesoram Industries & Cotton Mills Ltd. v. Commissioner of Wealth Tax, (1966) 2 SCR 688*, submitting that the phrase ‘*due and payable*’ implies that the debt is payable at present moment; and the grant of extension by applicant resolved the issue of payment of debts. Therefore, the debt was due and payable on expiry of extended period i.e., after March 31, 2017. Hence, there is no default under the IB Code by Corporate Debtor as due to the ongoing restructuring scheme the amount was not due and payable yet.
9. The learned Counsel for the Applicant with regards to the 3rd & 4th issue submitted that there is no bar on the Applicant filing an application under the IB Code after initiating action under SARFAESI Act and approaching the DRT against the guarantors and the Corporate Debtor. Referring to the proceedings as just and right, the Counsel relied on *Indus Financial Ltd. v. Quantum Ltd., C.P.No. 1043/I&BP/NCLT/MB/MAH/2017*, contended that the proceedings under the IB Code are for a limited period and for the larger benefit of both the Corporate Debtor and the Creditor.
10. Placing reliance on *Innoventive Industries Case (Supra), Indian Bank v. M/s. Infinitas Energy Solutions Pvt. Ltd., CP/558/(IB)/CB/2017, ICICI Bank Ltd. v. ABG Shipyard Ltd., C.P.(I.B) No. 53/7/NCLT/AHM/2017*, it was submitted that the IB Code will override the SARFAESI and DRT Acts by virtue of the Non-Obstante clause u/s. 238 r/w. Section 14 of the IB Code. Additionally, relying on *Ram Kishun & Ors. v. State of U.P. & Ors., (2012) 11 SCC 511*, it was submitted that the liability of the guarantors being co-extensive with that of

the Principle Debtor, the borrower can proceed against the guarantors. Hence the Applicant is not barred from filing an application under the IB Code.

11. On the other hand, the Counsel for the Respondent submitted that the Applicant is barred from filing an application under the IB Code for already having initiated action under the SARFAESI Act and DRT Act which are effective in the present case. The Respondent placing reliance on *Jay Engineering Works Ltd. v. Industry Facilitation Council & Anr.*, (2006) 8 SCC 677, has contended that the Non-Obstante Clause varies from case to case and there has to be harmonious construction of the two enactments when the application of the earlier act is attracted. Evidently, the non-obstante clause should not be applied in the present matter.
12. Furthermore, the Respondent has contended that the Applicant has approached the NCLT under the IB Code with unclean hands and malafide intention of staying the proceedings under the SARFAESI Act citing procedural flaws on part of the Applicant. Relying upon *Neeta Chemicals (I) Pvt. Ltd. v. State Bank of India, Company Appeal (AT) (Insolvency) No. 174 of 2017*, contended that the present application cannot be admitted. Further by placing reliance on *Sunanda Kumari v. Standard Chartered Bank*, (2007) 135 Comp Cas 604 (KAR), it was contended that the creditor is required to reply u/s.13(3A) of the SARFAESI Act. Non classification of accounts as Non-Performing Asset (NPA) as a pre-requisite u/s. 13(2) of the Act evidences the fault of Bank. The admission of the present application would cause benefit to the Applicant of its own wrong so it should be set aside relying upon *B.M Malani v. CIT & Anr.*, (2008) 10 SCC 617.
13. It was contended that the filing of the present application initiated parallel proceedings violating the principles of Natural Justice as held in *Ravindra Haribhau Karmarkar v.*

Shaila Ravindra Karmakar & Anr., 1992 Cri LJ 1845 and *Sunil Kumar & Ors. v. National Insurance Co. Ltd.*, 2010 (119) DRJ 533. Simultaneous filing of applications against the guarantors and Respondent before DRT and filing against Respondent on same issue and cause of action causes initiation of parallel proceeding, and consequently violation of Natural Justice and infringement of Section 424 of the Companies Act, 2013. Therefore, the Applicant is barred from invoking this application after initiating action under the SARFAESI Act and DRT Act.

14. Furthermore, with regard to the 5th issue, the Applicant submitted that the non-disbursement of the entire sanctioned loan amount was fair since the Respondent had failed to comply with the terms of the loan by not paying the interest amount; and the Banks performing public function cannot risk loss of huge public funds. The Counsel relied upon *Managing Director, Maharashtra State Financial Corporation & Ors. v. Sanjay Shankarsa Mamarde*, (2010) 7 SCC 489, and submitted that when the non-payment of interest by Respondent in compliance with the terms of commitment, the Bank cannot be alleged for consequential non-disbursement; for the Bank functioning in public interest is well within its rights to stop the disbursement of such loan to a defaulter, as held in *Surjeet Singh Bhamra v. Bank of India*, (2016) 4 SCC 204.

15. On the other hand it was submitted by the Respondent that the non-disbursement was not fair as the Respondent was dependent upon the agreed and sanctioned loan amount for carrying on its business operations. Due to the doctrine of *promissory estoppel* as discussed in *Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh*, (1979) 2 SCC 409, the Respondent had acted upon the promise of the Applicant for disbursement of sanctioned loan amount. The Counsel cited *Magnum Films v. Golcha Properties Pvt. Ltd.*, AIR 1984 Del

162, and submitted that it's the basic rule of contract that the promisor must perform in an absolute manner exactly what he has undertaken to do. Additionally, had the Applicant disbursed the funds, the Respondent could have availed the scrapped 5/20 rule and fly international, showing revival and hence the non-disbursement has deteriorated the Company's position.

16. Thereafter, under 6th issue, the Applicant submitted that the total amount to be paid is appropriate and undisputed as it is claiming only the principle amount that had been disbursed i.e., INR 6,000 Crores (Rupees Six Thousand Crores Only) and the interest @ 24% p.a. (including penal interest) due thereon i.e., INR 6,000 Crores (Rupees Six Thousand Crores Only). The Applicant by referring to *Central Bank of India v. Ravindra & Ors., (2002) 1 SCC 367*, submitted that it is well within its right to charge penal interest as the Respondent has failed in paying interests. By further referring to *Innoventive Industries Case (Supra)* and *State Bank of India, Colombo v. Western Refrigeration Pvt. Ltd., C.P.(I.B) No. 17/7/NCLT/AHM/2017*, the Counsel has contended that the Adjudicating Authority is not required to look into the dispute of amount u/s. 7 as the application can be admitted the moment default is ascertained, provided the application is complete.

17. In response, the Respondent submitted that the amount claimed is not appropriate and mala fide, hence disputed it to be inflated. Relying on *In Re: One Coat Plaster & Ors., Company Application No.(I.B.) 07/PB/2017* and *In Re: Creative Solutions & Ors., Company Application No.(I.B.) 34/PB/2017*, submitted that the application needs to be rejected on grounds of being inflated and disputed. The Principle amount is disputed as it cannot be demanded since there was agreed moratorium on the loan demand rendering it not due and payable before the expiry of the said period. Moreover, there were payments of interest on

several occasions both during and before the CDR scheme. It was further submitted that the penal interest charged is not reasonable or unfair since the same had never been agreed between the parties and is hence in contravention of the RBI (Interest on Advances) Directions, 2016. The Counsel also cited *Bell Finvest (India) Ltd. v. Intercorn Container Survey & Commodities Pvt. Ltd., C.P.No.1153/I&BP/2017*, wherein the application was rejected on the grounds of usurious interest rates.

18. After considering the arguments of both the sides, we conclude that the application filed by the Applicant is not maintainable as primarily there is no default u/s. 3(12) of the IB Code. Taking the aid of the judgment of the Apex Court in *Kesoram Industries Case (Supra)* and *Innoventive Industries Case (Supra) para 28*, the bench believes that the debt was not due and payable instantly. We disagree with the Counsel appearing for the Applicant and keeping in mind the ongoing restructuring scheme that there is no default on part of the Corporate Debtor as well as relying on *Innoventive Industries Case (Supra) para 30*, “*It is of no matter 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 sense that it is payable at some future date*”, hold that the debt was payable on future date and hence no default u/s. 3(12) can be ascertained.

19. The bench disagrees with the Counsel for the Applicant on the 3rd & 4th issues that Applicant has approached NCLT under the IB Code with mala fide intentions of staying the proceedings under the SARFAESI Act. The action taken by the Applicant under the SARFAESI Act is not in consonance with the statutory mandate of declaring NPA before issuing Demand Notice u/s. 13(2) of the Act and replying to the objections raised by the Corporate Debtor u/s. 13(3A). Therefore, escaping from procedural flaws, the Applicant has approached the NCLT with unclean hands for benefitting from its own wrong through

moratorium u/s. 14 of the IB Code. Hence, relying on *Neeta Chemicals Case (Supra)* the present application cannot be accepted.

20. We agree with the contention of the Counsel for the Respondent that the filing of the application under the IB Code is creation of parallel proceedings. As per the Section 424 of Companies Act, 2013 and *Innoventive Industries Case (Supra)*, NCLT shall adhere to the Principles of Natural Justice in site of not being bound by CPC. Referring *Ravindra Haribhau Case (Supra)*, *Sunil Kumar Case (Supra)*, it has been observed by the bench that Natural Justice demands parallel proceedings not to be allowed in different forums. Herein, there is existence of parallel proceedings in light of ongoing proceedings before DRT. The Non-obstante clause, as held in *Jay Engineering Case (Supra)*, varies from case to case, and is not applicable since the proceedings under previous enactments have already been initiated.
21. The non-disbursement of the entire sanctioned loan amount was unfair as applying the doctrine of *promissory estoppel*, as discussed in *Motilal Padampat Case (Supra)*. The Corporate Debtor had acted upon the promise of the Applicant and structured its business operations accordingly. The non-disbursement of funds has made the Company handicapped and could not cope with losses caused by external factor, defeating the sole objective of the debt restructuring. Hence, it was the wrong on the part of creditor by not disbursing entire well collateralized sanctioned loan amount.
22. We are also of view that the total amount claimed is disputed, and agree with the contentions raised by the Counsel for the Respondent. Taking into consideration *M/s. Starlogs Enterprises Ltd. v. ICICI Bank Ltd. (Supra)*, *Madhusudhan Gordhandas & Co. v. Madhu Wollen Industries Pvt. Ltd. (Supra)*, there is a *bonafide* dispute found existing between the

parties. We disagree with the Counsel for the Applicant and find that the Applicant has failed to establish the method of computing the total claimed amount and the grounds of charging such unreasonable penal interest and substantiate the absence of a dispute.

23. In the light of the above conclusions, the impleading Application u/s. 7 of the IB Code stands dismissed.

(Y)

MEMBER, TECHNICAL

(X)

MEMBER, JUDICIAL