

IN THE NATIONAL COMPANY LAW TRIBUNAL
COURT - I, MUMBAI BENCH

C.P. (IB) No. 4106/NCLT/MB/2018
Under Section 7 of the I & B Code, 2016

In the matter of
Bank of Baroda

... Petitioner

V/s

Topworth Tollways (Ujjain) Private
Limited

... Respondent

Order Dated: 09.10.2020

Coram:

Hon'ble Member (Judicial), Janab Mohammed Ajmal

Hon'ble Member (Technical), Shri. V. Nallasenapathy

Appearances (via Video-conference):

For the Petitioner : Mr. A. K. Mishra and Mr. Rohan Agrawal with
Ms. Almira Lasrado i/b MDP and Partners

For the Respondent : Mr. Atul Singh, Advocate i/b AVS Legal

ORDER

Per: V. Nallasenapathy, Member (Technical)

1. This Company Petition is filed by Bank of Baroda (the Petitioner) (Formerly Dena Bank) under Section 7 of the Insolvency and Bankruptcy Code, 2016 (the Code) read with Rule 4 of the Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rules, 2016 (the Rules) against Topworth Tollways (Ujjain) Pvt. Ltd. (the



Corporate Debtor) for initiating Corporate Insolvency Resolution Process (CIRP) alleging default in payment of a financial debt to the tune of Rs.50,90,50,092/- (Rupees Fifty Crores Ninety Lakhs Fifty Thousand Ninety Two only).

2. The Form - 1 filed by the Petitioner reveals that the Petitioner sanctioned a term loan of Rs. 45,00,00,000/- (Rupees Forty Five Crores only) on 13/12/2010 to the Corporate Debtor. The Corporate Debtor availed the term loan to the extent of Rs. 34,90,53,689/- (Rupees Thirty Four Crores Ninety Lakhs Fifty Three Thousand Six Hundred Eighty Nine only).
3. The Corporate Debtor executed the following security documents in respect of the loan:
 - a) First mortgage and charge over all the Corporate Debtor's Properties and assets both present and future;
 - b) First charge on all intangible assets of the Corporate Debtor;
 - c) First Charge/assignment of all receivables/revenues of the Corporate Debtor from the project;
 - d) First charge on all the Corporate Debtor's Bank account including without limitation, the escrow account and the Debt Services Reserve Account ("DSRA").
 - e) Pledge of shares aggregating to 51% of the paid-up share capital of the Corporate Debtor up to the end of two years from SPCD and reduced to 26% of the issued and paid up equity share capital of the Corporate Debtor after the end of two years.
 - f) First Charge by way of assignment or creation of security interest on all the rights, titles, interest, benefits, claims and demands of the Corporate Debtor: -
 - i) Under the concession agreement and project document;
 - ii) In licences, permits and approval concerned;



- iii) On the insurance contract/policies procured by the Corporate Debtor;
 - iv) In any guarantees, liquidated damages, letter of credit or performance bond that may be provided by any counter party under any project contract in favour of the Corporate Debtor.
 - v) Corporate guarantee and undertaking by Crest Steel And Power Private Limited.
4. The Petitioner during the hearing of the petition produced the statement of accounts of the Corporate Debtor, which revealed that the Corporate Debtor defaulted in the interest payment on 31/01/2016. The statement of accounts further reveals that the Corporate Debtor also defaulted in the payment of principal instalment due on 31/03/2016. The Petitioner in Form - 1, categorically stated that the date of default is 31/01/2016.
5. The Corporate Debtor filed reply to the Petition and raised the following contentions:
- a. The address of the registered office of the Corporate Debtor is incorrectly stated as "Raheja Centre, Office No. 4, Ground Floor, 214, Free Press Journal Marg, Nariman Point, Mumbai - 400 021". The registered office of the Corporate Debtor was actually shifted to "16th Floor, Tower-3, Indiabulls Finance Centre, Senapati Bapat Marg, Elphinstone Road, Mumbai w.e.f 5th May 2016".
 - b. The Form - 1 incorrectly records the name of the Petitioner as "Oriental Bank of Commerce" instead of "Dena Bank". The requisite fee of Rs. 25,000/- (Rupees Twenty Five Thousand only) was paid by "Oriental Bank of Commerce" and not by the present Petitioner.



- c. The Petition is not maintainable for want of sufficient authority of the person claiming to be authorised to initiate the CIRP under the Code.
- d. The Form - 2 filed by the Resolution Professional (RP) is also not in order for the reason that the proposed Interim Resolution Professional (IRP) issued the Form for the appointment of him as IRP by the "Union Bank of India" and not by the Petitioner.
- e. The amount claimed in the Petition is not due and payable and the liability is denied. The Corporate Debtor is a special purpose company, which was entrusted by the Madhya Pradesh Road Development Corporation ("MPRDC") to augment the then existing roads from KM 59.4 of SH 27 to KM 132.8 of SH 31 by two laning the same on build, operate and transfer basis. The Corporate Debtor availed term loan facility of Rs.45,00,000,00/- (Rupees Forty Five Crores only) from the Petitioner for funding the road construction project and executed a common loan agreement dated 05/01/2011. After the completion of the road project the Corporate Debtor started collecting toll and making payment to the Petitioner.
- f. The MPRDC unilaterally suspended the toll collection during the auspicious period of "Simhastha Parv", 2016 i.e. from 01/04/2016 to 31/05/2016 for the purpose of convenience of the pilgrims using the road. The suspension of toll collection coupled with the under recovery from the toll road had given jolt to the Corporate Debtor and the earnings of the Corporate Debtor. This adversely impacted the payments to the Petitioner. The Petitioner failed to appreciate the event of *force majeure* and treated the Corporate Debtor as defaulter in repayment of loan. Thus, the Petitioner erred in declaring that the Corporate Debtor committed default on



31/01/2016 and also erred in declaring the account of the Corporate Debtor as Non-Performing Asset (NPA) as on 30/04/2016. In view of this, it is evident that a long standing dispute exists in respect of all the alleged default committed by the Corporate Debtor.

- g. The date of default of 31/01/2016 is incorrect. As per the definition of term "event of default" in the Common Loan Agreement dated 05/01/2011, the default shall mean the event specified under clause 7.1 (b) as below:

"b) Default in payment of interest, etc.

Default has been committed by the Borrower in payment of any interest on the Loan and/or payment of any amount in connection with the Facility on the respective Due Dates or on being demanded by the Lenders as the case may be and such default has continued for period of 30 (thirty) days."

- h. In view of the above 'clause', the interest for the month of January was due on 01/02/2016 and there is 30 days' time for making the payment, failing which the default occurs. Accordingly, the due date of payment would fall on 03/03/2016. The date of default mentioned as 31/01/2016 is not correct.
- i. The MPRDC under the concessions agreement, considering the cancellation of toll collection on account of "Simhastha Parv", 2016 extended the toll collection period equivalent to the suspension period. However, it is submitted that because of the gap in toll collection the Corporate Debtor was unable to cover the backlog dues payable to the Petitioner. Hence it is submitted that the Corporate Debtor is not responsible for the occurrence of the default.



- j. All the toll collections are credited to the escrow account operated by the lead bank and the lead bank has not made payment to the Petitioner from the escrow account.
- k. The amount claimed to be in default is completely incorrect. The amount claimed in the petition is Rs. 49.92 Crores including interest and penal interest. The petitioner instead of claiming only the defaulted interest and the defaulted principal pertaining to the specified quarter, claimed the entire amount. Hence the amount claimed in the petition is wrong.
6. We have heard both the sides at length. We are of the view that mention of incorrect address in the Form, payment of fees by Oriental Bank of Commerce instead of Dena Bank does not have any bearing on the merits of the Petition. Any how the Corporate Debtor is before us now through a counsel and mention of old address in the Form 1 is a rectifiable defect. Since the Petition is signed by the Petitioner Bank's officer, the contention that the person who signed the Petition does not have sufficient authority does not hold water. It is beneficial to refer to the judgement Hon'ble NCLAT in *Palogix Infrastructure Pvt. Ltd. Vs. ICICI Bank Ltd. (Company Appeal (AT) (Insol) No. 30 of 2017)*:

"38. This apart, if an officer, such as senior Manager of a Bank has been authorised to grant loan, for recovery of loan or to initiate a proceeding for 'Corporate Insolvency Resolution Process' against the person who have taken loan, in such case the 'Corporate Debtor' cannot plead that the officer has power to sanction loan, but such officer has no power to recover the loan amount or to initiate 'Corporate Insolvency Resolution Process', in spite of default of debt.

39. If a plea is taken by the authorised officer that he was authorised to sanction loan and had done so, the application



under section 7 cannot be rejected on the ground that no separate specific authorization letter has been issued by the 'Financial Creditor' in favour of such officer designate.

40. In view of reasons as recorded above, while we hold that a 'Power of Attorney Holder' is not empowered to file application under section 7 of the 'I&B Code', we further hold that an authorised person has power to do so."

7. As far as the objection relating to the name of the bank is concerned the Petitioner submitted that this bench by an order dated 31/07/2019 in M.A. No. 1534/2019 allowed the amendment to rectify the defects and substitute the name of Bank of Baroda for Dena Bank (the latter having merged with the former w.e.f. 01.04.2019). Hence this objection does not survive. Further in respect of the objection relating to the Form-2 filed by the IRP, Mr Anuj Bajpai, we have gone through the Form-2 dated 15/10/2018 and the same is in order.
8. The Corporate Debtor's contentions that the Petitioner failed to appreciate the event of *force majeure* and wrongly declared the account as NPA and hence there is a dispute over the default, does not have legs to stand in a Petition under Section 7 of the Code.
9. The statement of account produced by the Petitioner clearly shows that the interest due as on 31/01/2016 was paid only on 16/07/2016. The principal due of 31/03/2016 was paid on 23/08/2016. Even assuming, without accepting the contention of the Corporate Debtor, that the date of default of interest was on 03/03/2016, the payment having been made much later i.e. on 16/07/2016, the commission of default is clear. We are unable to accept the argument of the Corporate Debtor that there was no default. The default committed by the Corporate Debtor



thus squarely falls within the definition of default as provided under Section 3(12) of the Code.

10. The contention of the Corporate Debtor that the whole outstanding of Rs.49.92 Crores shown as defaulted is incorrect and cannot be accepted for the reason that when a single payment of interest or principal is defaulted the Petitioner is entitled to claim the entire amount under the acceleration clause as provided in clause 7.2 of the Common Loan Agreement which provides as below:

"7.2 CONSEQUENCES OF DEFAULT

If one or more of the aforesaid Events of Default shall occur and be continuing, thereupon, and in every such event and that any time thereafter during the continuance of such event, the Lenders shall have the right to terminate their Commitments and accelerate the obligations of the Borrower and in exercise of such rights the Lenders may, take one or more of the following actions:

- (i) declare the unpaid principal amount of and interest in respect of the Loans, and all other obligations and all other amounts payable by the Borrower hereunder and under the Security Document to be forth with due and payable, whereupon such amounts shall become forthwith due and payable.....".*

11. On this point, it would be beneficial to refer to the judgment of Hon'ble Supreme Court in the case of *Innoventive Industries Ltd. Vs. ICICI Bank and Anr.* - (2018) 1 SCC 407. The principle decided is stated below:

"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 financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money.

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.

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."



12. The above discussion clearly reveals that there is debt as claimed in the Petition and the Corporate Debtor defaulted in making the payment. Hence petition deserves admission.
13. The Petitioner has proposed the name of Mr Anuj Bajpai, a registered Insolvency Resolution Professional having Registration Number [IBBI/IPA-001/IP-P00311/2017-18/10575] as Interim Resolution Professional, to carry out the functions as mentioned under the Code. In Form 2 annexed to the Petition, the proposed IRP has declared that no disciplinary proceedings are pending against him.
14. The Petition under sub-section (2) of Section 7 of the Code is complete. The existing financial debt of more than rupees one lakh is due and payable against the corporate debtor and its default is also proved. Petition is within the limitation. Accordingly, the Petition filed under section 7 of the Code for initiation of CIRP against the corporate debtor is admitted. Hence ordered.

ORDER

- i. The Company Petition be and the same is admitted on contest.
- ii. The Corporate Insolvency Resolution Process of the respondent shall commence from this date and shall be completed within 180 days hence.
- iii. Mr Anuj Bajpai, having address at 1006, Raheja Center, Nariman Point, Mumbai - 400 021 having Registration No. IBBI/IPA-001/IP-P00311/2017-18/10575 and email ID anuj@headwayip.com is appointed as the Interim Resolution Professional. No disciplinary proceeding is pending/proposed against him as per the IBBI website.




- iv. He is directed to take charge of the Respondent/Corporate Debtor's management forthwith and take necessary steps in furtherance of the CIRP in terms of Sections 13(2), 15, 17, 18 and 20 of Code and Rules made there under.
- v. **Moratorium in respect of the respondent is hereby declared under Section 14 of the Code.**
- vi. The Directors, Promoters or any other person(s) associated with the management of Corporate Debtor shall extend all assistance and cooperation to the IRP as stipulated under section 19 for effectively discharging his functions under the Code.
- vii. The Registry is directed to communicate the order to the Petitioner/Financial Creditor and the Respondent/Corporate Debtor forthwith.
- viii. The petitioner/FC and the Registry are also directed to send the copy of this order to IRP for necessary compliance.

Sd/-
V. Nallasenapathy
Member (Technical)

Sd/-
Mohammed Ajmal
Member (Judicial)



Certified True Copy
Copy Issued "free of cost"
On 8/11/2020


J.T Registrar
National Company Law Tribunal Mumbai Bench