

IN THE NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI

BENCH-VI

IB-1572/(ND)/2019

Section: Under Section 7 of the Insolvency and Bankruptcy Code, 2016 and Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016.

IN THE MATTER OF:

M/s. BANK OF INDIA

Registered Office at: -

Janpath Branch, 66, Janpath

New Delhi- 110001

...Applicant/Financial Creditor

Versus

M/S WEST FACE HOSPITALITY AND MANAGEMENT

PVT. LTD

At: 17A/77, North West Avenue

Punjabi Bagh, New Delhi 110026

...Respondent/ Corporate Debtor

CORAM:

SHRI. P.S.N. PRASAD, MEMBER (JUDICIAL)

SHRI. RAHUL BHATNAGAR, MEMBER (TECHNICAL)

Counsel for Petitioner: Ms. V. Seshagiri and Ms. Prachi Jain, Counsels.

Counsel for Respondent: Mr. Rajat Malhotra, Adv with Ms. Madhu K. Singh, Adv.

ORDER

PER: P.S.N. PRASAD, MEMBER (JUDICIAL) &

RAHUL BHATNAGAR, MEMBER (TECHNICAL)

Date: 05.04.2024

1. This Petition has been filed by Bank of India to initiate Corporate Insolvency Resolution Process (“CIRP”) against M/s. West Face Hospitality and Management Pvt. Ltd under Section 7 of the Insolvency and Bankruptcy Code 2016 (hereinafter referred to as “the Code”) for the alleged default on the part of the Respondent in repayment of debt of Rs 26,29,04,506.74/- as on 26.05.2019. The details of transactions leading to the filing of this application as averred by the Applicant are as under:

- i. The Corporate Debtor approached the Financial Creditor requesting a Term Loan of Rs. 15 Crores under a multiple banking arrangement for the purpose of meeting part of the construction of the Corporate Debtor's boutique hotel facilities.
- ii. That Sanction Letter and Hypothecation cum Loan Agreement dated 12th May, 2010 were executed and equitable mortgage was created over its share in immovable property being 17A, North West Avenue, West Punjabi Bagh, New Delhi 110026 and the share of two directors. However, the Corporate Debtor defaulted in the repayment of the term loan.
- iii. The term loan account was classified as Non-Performing Asset (NPA) on 31st July, 2013.
- iv. The Financial Creditor proceeded with issuing notice under SARFAESI Act, 2002 to take possession of the secured asset.
- v. A Possession Notice under S. 13(4) of SARFAESI Act, 2002 was published in the local newspapers

and also sent to the Corporate Debtor demanding to the hand over the possession of the secured asset to the authorised representative of the Financial Creditor.

vi. The possession notice issued by the Financial Creditor under S. 13(4) of SARFAESI Act, 2002 was challenged by the Corporate Debtor as well as the third party (Mr. Rajesh Gullah) on 10th January, 2014 and 9th August, 2014.

vii. The Hon'ble DRT ordered *"the respondent bank/Receiver (the Financial Creditor herein) is hereby restrained from taking the physical possession of the property in question under the SARFAESI Act, 2002 subject to deposit of an amount of Rs. 5 crores within 6 months through six equal monthly installments by the applicant (the Corporate Debtor herein) with an affidavit-cum-undertaking within three working days with advance copy of the same to the respondent bank that the applicant shall make payment of the above amounts accordingly. It is made clear that*

single default on the part of the applicant at any stage will entitle the respondent bank to proceed further in accordance with law in respect of the property in question without seeking further clarification in this regard”.

viii. The Corporate Debtor had submitted several One Time Settlement (OTS) proposals to the Financial Creditor between 8th December, 2015 to 18th April, 2018. The last OTS proposal made on 18th April, 2018 by the Corporate Debtor which was accepted by the Financial Creditor on 23rd August, 2018.

ix. The Corporate Debtor was to deposit a minimum of 25 % of the approved OTS amount within 30 days i.e. on or before 23rd September, 2018 and the full payment of the OTS was to be made within 6 months i.e. on or before 23rd February, 2019. The Corporate Debtor had defaulted in depositing the OTS amount on 23rd September, 2018 and 23rd February, 2019 respectively.

- x. That the present Application is within the period of limitation and the date of default for the purpose of filing the captioned Application is 23rd September, 2018 and the Application having been filed on 28th June, 2019 is within prescribed the limitation period.
2. The Corporate Debtor's submissions which are relevant for adjudication are as under: -
- i. The application under Section 7 is not supported by a Board Resolution and instead is filed on the basis of Power of Attorney. This Power of Attorney too is not backed by any Board Resolution and is admitted to have been executed basis *“relevant guidelines issued by the Legal Department, Head Office of the Financial Creditor”*
 - ii. To compound the issue, the Power of Attorney mentioned in Form I i.e. POA dated 18.06.2018 neither exists nor has been filed before this Tribunal. Instead, the POA in Annexure W is one POA dated 28.08.2014, which is not the stated source of power in Form I. Even otherwise, this

POA dated 28.08.2014 neither refers to nor files therewith any Board Resolution.

- iii. This absence of Board Resolution is affirmed by the FC in the affidavit dated 07.12.2019 filed in support of additional documents filed on 25.11.2019. In this Affidavit, Mr. V.K. Dhawan states that his source of power is the POA dated 28.08.2014, and which is neither executed in pursuance of nor supported by a Board Resolution.
- iv. At the time of filing the present Section 7 petition, the Applicant admittedly failed to disclose a date of default. The Corporate Debtor in its reply pointed out that the petition lacks basic details and is therefore liable to be dismissed. That this Adjudicating Authority, in the interest of justice, vide order dated 08.02.2021 granted liberty to the Financial Creditor to incorporate a date of default. Subsequent to the issuance of the order, the Financial Creditor submitted an affidavit dated 15.02.2021. In this affidavit, the Financial Creditor failed to disclose that it had omitted the date of

default in the Application Form 1 submitted to this Tribunal on 28.06.2019. Instead, taking advantage of the liberty granted by this Tribunal to include the default date, the Financial Creditor has chosen to file an amended Form 1. Rather than simply inserting the date in row 2 of part IV of Application Form 1, the Financial Creditor has opted for substantial modifications to the entire application.

- v. The Name and address of the Authorized Representative who initially submitted the Form 1 Application have been modified. The original officer, Mr. V.K. Dhawan, claimed authorization through a Power of Attorney dated 18.06.2018, but the details have been altered to reflect Mr. Nabarun Chatterjee as the Authorized Representative, citing a Branch Circular dated 18.07.2019 as the source of authorization.
- vi. It is further submitted that the Financial Creditor has fraudulently tried to shift the date of default from the date of NPA to the date of non-compliance

with an allegedly accepted OTS offer with the sole intent of side stepping the issue of limitation

vii. Since the Financial Creditor has failed to file a defect free petition as mandatory for invocation of Section 7 under the Code, the petition is liable to be dismissed on this procedural ground itself.

viii. Onetime Settlement proposals made “without prejudice” by the Corporate Debtor do not amount to acknowledgment of debt in writing and also it is well settled that the submission of settlement proposal is always without prejudice to the rights and contentions of the parties and, therefore, any admission made in the settlement proposal cannot be used against the Corporate Debtor.

ix. Litigation commenced between the parties on 09.11.2015 when the Financial Creditor filed an application under section 19 of the RDDBFI Act, 1998. In an attempt to settle the dispute, the Corporate Debtor made multiple offers on 08.12.2015 and 18.04.2018 The Financial Creditor acknowledged in its internal document dated

22.12.2016 that the offers were made to settle the dispute. All offers were made “without prejudice” to the parties' rights and legal arguments, including the contention that no amount was in default.

x. Most importantly it needs to be highlighted that the said proposals for the settlement were made in the DRT proceedings filed by the Financial Creditor, but no such OTS proposal has been made in the present proceedings before this Hon'ble Tribunal and since both the proceedings are independent, and any OTS proposal made in relation to the DRT and SARFAESI proceedings will not amount to acknowledgement before this Tribunal.

xi. The application lacks a valid cause of action under Section 7 of the Insolvency and Bankruptcy Code, as the intent of Financial Creditor is not insolvency of Corporate Debtor, but to get hold of the of the only asset of the Corporate Debtor, i.e., the allegedly mortgaged Property. This is apparent from the fact that the Financial Creditor had

initiated and is contesting two proceedings under SARFESI Act.

xii. The Respondent has no business, and is primarily a landholding company, and the bank, acknowledges that the Respondent's property has been used as security for other businesses of co-promoters.

xiii. The bank's true motive is the recovery of larger alleged debts owed by other entities of Wadhawan group, as evidenced by proposed OTS. However, insolvency proceedings are selectively initiated against the Respondent, a landholding company, raising suspicions about the true intent of the petition and its compliance with the provisions of the Insolvency and Bankruptcy Code.

xiv. The Financial Creditor deliberately omitted crucial information about its status as a shareholder in the Corporate Debtor's Company, establishing a related party relationship. The Financial Creditor concealed from this Hon'ble tribunal that, at the time of granting the alleged

loan, it was a shareholder of the Corporate Debtor, violating directives from the Reserve Bank of India under Section 21 and 35A of the Banking Regulation Act, 1949

3. We have heard the Ld. Counsel appearing for the Petitioner and the Respondent and perused the averments made in the pleadings filed by both the parties.
4. The Corporate Debtor has made following objections to the Petition filed by the Financial Creditor: -
 - i. The Petitioner failed to place on record Power of Attorney (POA)/Board Resolution (BR) and in the absence of any BR/POA the petition u/s 7 of the Code should be dismissed.
 - ii. The OTS submitted by CD was made before the Debt Recovery Tribunal (DRT) and not before this Tribunal and an OTS does not amount to an acknowledgment of debt; hence, it should not be considered
 - iii. The Financial Creditor concealed the information about its status as a shareholder in the Corporate

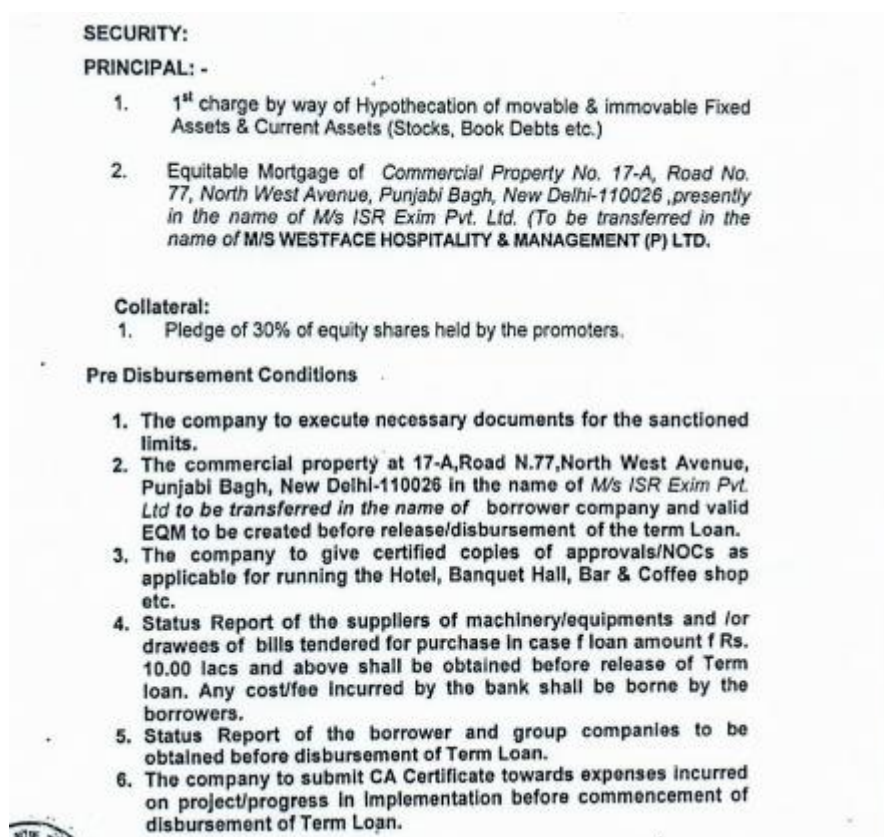
Debtor's Company, establishing a related party relationship.

A. With respect to the first issue, it was submitted by the FC that the Board of Directors vide resolution dated 27.06.2019 had duly authorized all its officers in the rank of Assistant General Managers and Deputy General Managers to sign, execute Applications, Appeals, Vakalatnama to be filed before NCLTs, NCLATs, High Courts and Supreme Court under IBC 2016. The same is on record. Further the Petition was filed on 28.06.2019 by the Financial Creditor and the affidavit was sworn in by Mr. V.K. Dhawan, Assistant General Manager who was duly authorised by virtue of the Borad Resolution dated 27.06.2019 to file the present Section 7 Application. Hence, we are of the view that there is no illegality on part of Financial Creditor to initiate CIRP against the CD.

B. With regard to the second issue, it is noted that an OTS was proposed by the CD, which was accepted by the FC. However, subsequently, the CD failed to honor the terms of the OTS, leading to the FC filing the

present petition. We are of the considered view that an OTS is meant for amicable resolution, the fact that the OTS was entered into has already been admitted by the CD, and it is well-established that an OTS proposal amounts to an acknowledgment of debt, as held by the Hon'ble NCLAT in the matter of *Tejas Khandhar vs. Bank of Baroda* (12.07.2022 - NCLAT): MANU/NL/0439/2022, wherein it was held that the OTS proposal falls within the ambit of 'acknowledgment of debt' as envisaged under Section 18 of the Limitation Act, 1963. Furthermore, in the matter of *Ashish Kumar vs. Vinod Kumar Pukhraj Ambavat and Ors.* [2020] 219 Comp Cas 431, the Hon'ble NCLAT held that a fresh period of limitation commenced with every OTS proposal made. In the present case, as the Corporate Debtor made OTS proposals to the Financial Creditor between December 8, 2015, and April 18, 2018, the last of which was on April 18, 2018, therefore the contentions of the CD is not legally tenable.

C. With respect to the third issue, from the perusal of the records it is observed that the sanction letter dated 10.05.2010 indicates that 30% of equity shares has been pledged to FC as a collateral against the loan sanctioned. Relevant extract is reproduced below: -



Thus, it cannot be said that the FC is a related party of the Corporate Debtor.

5. In a section 7 application, the requirement is only to prove the existence of debt and its default and the claim filed by the Applicant is within the period of limitation. Hence, the Applicant /Financial Creditor has met with the requirements.
6. In light of the above, this Adjudicating Authority is of the considered view that this is a fit case for initiation of CIRP of the Corporate Debtor with immediate effect.
7. Sub-section (3) (b) of Section 7 mandates the Financial Creditor to furnish the name of an Interim Resolution Professional. In compliance thereof the applicant has proposed the name of Mr. Prabhat Ranjan Singh for appointment as Interim Resolution Professional having registration number IBBI/IPA-002/IP-N00428/2017-2018/11239. The Proposed IP has a valid AFA which is valid upto 06.11.2024. Accordingly, this Adjudicating Authority, hereby appoints Mr. Prabhat Ranjan Singh (Email – prabhat.rs.advocate@gmail.com), to act as Interim Resolution Professional. The IRP may once again submit his consent and also a confirmation that no disciplinary proceedings are pending against him along

with updated authorization for assignment. He shall take such other and further steps as are required under the statute, more specifically in terms of Section 15, 17 and 18 of the Code and file his report within 30 days before this Bench.

8. In pursuance of Section 13 (2) of the Code, we direct that public announcement shall be made by the Interim Resolution Professional immediately (3 days as prescribed by Explanation to Regulation 6(1) of the IBBI Regulations, 2016) with regard to admission of this application under Section 7 of the Insolvency & Bankruptcy Code, 2016.

9. We also declare moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed:

“(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any

judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.”

10. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government or the supply of the essential goods or services to the Corporate Debtor as may be specified, are not to be terminated or suspended or interrupted during the

moratorium period. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which has come into force w.e.f. 06.06.2018, the provisions of moratorium shall not apply to the surety in a contract of guarantee to the corporate debtor in terms of Section 14 (3) (b) of the Code.

11. The Interim Resolution Professional shall perform all his functions contemplated, inter-alia, by Sections 15, 17, 18, 19, 20 & 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, Rules and Regulations. It is further made clear that all the personnel connected with the Corporate Debtor, its promoters or any other person associated with the Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional as may be required by him in managing the day to day affairs of the 'Corporate Debtor'. In case there is any violation committed by the ex-management or any preferential/ undervalued/ tainted/illegal transaction by

ex-directors or anyone else, the Interim Resolution Professional shall make an application to this Adjudicating Authority (Tribunal) with a prayer for passing an appropriate order. The Interim Resolution Professional shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor' as a part of its obligation imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code, Rules and Regulations.

12. The office is directed to communicate a copy of the order to the Financial Creditor, the Corporate Debtor, the Interim Resolution Professional and the Registrar of Companies, NCT of Delhi & Haryana at the earliest possible but not later than seven days from today. The Registrar of Companies shall update its website by updating the status of 'Corporate Debtor' and specific mention regarding admission of this petition must be notified to the public at large.

Let copy of the order be served to the parties concerned.

SD/-
(Rahul Bhatnagar)
Member (Technical)

SD/-
(P.S.N Prasad)
Member (Judicial)