

IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD
COURT - 2

ITEM No.302
C.P. (IB)/288(AHM)2023

Order under Section 7 IBC

IN THE MATTER OF:

AXIS BANK LIMITED
VS
JOHN ENERGY LIMITED

.....Applicant

.....Respondent

Order delivered on: 16/05/2024

Coram:

Mrs. Chitra Hankare, Hon'ble Member(J)
Dr. Velamur G Venkata Chalapathy, Hon'ble Member(T)

ORDER

The case is fixed for pronouncement of the order. The order is pronounced in the open court, vide separate sheet.

The petition has been disposed off by necessary orders. It is directed to the Registry, NCLT Ahmedabad to release the FD deposited in terms of Hon'ble NCLAT order by the Investor Alfa Alternatives Structured Credit Opportunities Fund (AASCOF) in favour of the investor AASCOF immediately.

-Sd-

DR. V. G. VENKATA CHALAPATHY
MEMBER (TECHNICAL)

-Sd-

CHITRA HANKARE
MEMBER (JUDICIAL)

**IN THE ADJUDICATING AUTHORITY
THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT - 2**

CP (IB) No. 288/ NCLT / AHM / 2023

(Application under Section 7 of the Insolvency & Bankruptcy Code, 2016)

Axis Bank Limited

... Applicant/Financial Creditor

Versus

John Energy Limited

... Respondent/Corporate Debtor

MEMO OF PARTIES:

Axis Bank Limited

a Bank incorporated under the Companies Act, 1956 engaged in banking business under the Banking Regulation Act, 1949 having its registered office at Trishul, 3rd Floor, Opposite Samartheshwar Temple, Near Law Garden, Ellis Bridge, Ahmedabad - 380 006 and its corporate office at: 7th Floor, Axis House, C-2, Wadia International Centre, Pandurang Budhkar Marg, Worli, Mumbai - 400025.

...Applicant/Financial Creditor

Versus

John Energy Limited,

a company incorporated under the Companies Act, 1956, having its registered office at First Floor, Shapath-III, Near GNFC Towers, S.G. Highway, Ahmedabad

...Respondent/Corporate Debtor

Order pronounced on: 16.05.2024

**Coram: Mrs. Chitra Hankare, Member(J)
Dr. Velamur G Venkata Chalapathy, Member(T)**

Appearance:

For the Applicant : Mr. Prakash Shinde, Adv. a.w Ms. Niyati Merchant, Adv.
For the Respondent : Mr. Navin Pahwa, Sr. Adv. a.w Ms. Pragati Bansal, Adv. and Mr. Ravi Pahwa, Adv.
For the Investors : Mr. Saurabh Soparkar, Sr. Adv.

JUDGMENT

1. This application is filed under Section 7 of the Insolvency and Bankruptcy, 2016 ("*the Code*") seeking initiation of Corporate Insolvency Resolution Process ("CIRP") of the Corporate Debtor for a claim amount of Rs.2,16,82,70,493.30/- (Rupees Two Hundred and Sixteen Crores Eight Two Lakhs Seventy Thousand Four Hundred and Ninety Three and paise Thirty only) as on 28.09.2023.
2. It is submitted that the Financial Creditor sanctioned Loan facilities of a total amount of Rs.61,51,99,999.99/- by executing various Sanction Letters. Pursuant to the same, the loan and security documents were executed by the Corporate Debtor in favor of the Financial Creditor. In addition, the loan availed by

the Corporate Debtor has been reflected in the following documents:

- Balance Sheet of the Corporate Debtor.
- The NESL Report.
- State of Account of the Financial Creditor as on 28.09.2023

3. It is submitted that, since the Corporate Debtor defaulted in making due payments, the Corporate Debtor's account was declared as a Non-Performing Asset (NPA) on 10.12.2018. Pursuant of the above default, a Recall Notice dated 09.09.2020 and a notice under Section 13(2) of the SARFAESI Act, 2002, was issued by the Financial Creditor to the Corporate Debtor dated 14.09.2020.
4. Pursuant to the issuance of the said 13(2) Notice, the Corporate Debtor approached the Financial Creditor on 09.11.2022 with a request for settlement and offered an OTS settlement of Rs.86 crores, which was I revised to Rs.91 crores vide its Letter dated 31.01.2023. The said OTS was accepted by the Financial Creditor subject to the entire settlement amount to be deposited on or before 31.03.2023. However the Corporate Debtor once again failed to comply with the timelines and thus the Financial Creditor vide its Letter dated 18.07.2023 has recorded that the

OTS has failed and thus stands lapsed and withdrawn. It is further submitted that the Corporate Debtor once again made an attempt to offer an OTS offer vide its letter dated 08.08.2023 which came to be accepted by the Financial Creditor vide its letter dated 01.09.2023. However, the Corporate Debtor once again failed to comply with the terms of the OTS.

5. The Corporate Debtor has in the Affidavit-in-Reply has raised standard plea, alleged contentions which are as under.

(a) The claim made by the Financial Creditor in the Petition is barred by the law of limitation;

(b) The Corporate Debtor is a solvent company and thus referred to and relied upon various Investor Letters during the course of hearing. However the offers made by the Corporate Debtor during the course of hearing came to be rejected by the Financial Creditor. As well to show the Corporate Debtor has settled with the other Bank and hence has the bandwidth to settle with the present Financial Creditor.

(c) It had offered repeated OTS to the applicant financial creditor which was originally accepted of its conditions but he could not complete the payment due to certain delays in

getting the strategic investor and also sought for extension. Initially the applicant had informed other creditors they would exit the exposure by accepting the OTS;

- (d) Filed a compliance affidavit to the NCLAT's order and the strategic investor had deposited the amount offered to both this applicant and ICICI Bank on 16 April 2024;
- (e) The debt due to the notice issued falls during the period of 10 A (even though date of default was on 30 Sept 2018) and recall notice issued on 9 Sept 2020 to be repaid withi 7 days.

6. From whatever has been stated and submitted hereinabove and from the material documents on record, the Financial Creditor hereby submitted that:

- (a) The present petition is complete in all respects and within the four corners of Section 7 of the Code.
- (b) The Corporate Debtor had availed loan facilities from the Financial Creditor and later, defaulted in repayment of outstanding amount due and payable to Financial Creditor.
- (c) The Corporate Debtor has duly acknowledged the existence of debt and default.

- (d) The Applicant submits that in view of the aforesaid authorities laid down by the various fora, the present petition is well within limitation and there being a default in repayment of a financial debt by the Corporate Debtor, the present petition deserves to be admitted.
- (e) The Applicant has suggested the following Insolvency Professional to act as the Insolvency Resolution Professional.

Submissions on the issue of limitation:

Dates	Events
Date of Default	30.09.2018
Non-Performing Asset (NPA)	10.12.2018
Acknowledgment of Debt	Letter dated 09.11.2022 and 31.01.2023
Acknowledgment of Debt 1	Email dated 08.08.2023
Recall Notice	09.09.2020
Notice u/s 13(2) was issued to the Corporate Debtor	14.09.2022

The applicant submitted that the Petition is within limitation. Further, Section 19 of the Limitation Act, 1963 makes it clear that the part payment of debt creates a fresh limitation period.

7. Further the applicant has stated that The Hon'ble Supreme Court has in the case of E.S. Krishnamurthy Vs. M/s. Bharathi Hi Tech Builders Pvt Ltd (Civil Appeal No.3325 of 2020)." has held: The Adjudicating Authority and Appellate Authority have acted beyond their authority in directing them to settle the claims within 3 months.
8. The Hon'ble Supreme Court in "*Seshnath Singh V/s Baidyabati Sheoraphulli Co-operative Bank Ltd*" (Civil Appeal 9198 of 2019) has considered the following issues:

- Section 18 of the Limitation Act prescribes an acknowledgment of present subsisting liability made in writing in respect of any right claimed by the opposite party and signed by the party against whom the right is claimed and has effect of commencing a fresh period of limitation from the date of which the acknowledgment is signed.

- Section 14 (2) of the Limitation Act provides that in computing the period of limitation for any application, the time during which the Petitioner had been prosecuting with due diligence another civil proceeding against the same party for the same relief shall be excluded where such proceeding is prosecuted in good faith.

- Section 14 squarely applies to proceedings under Section 7 of the IBC and includes civil proceedings before any forum.

Observations

The following points emerge from the application & submissions made.

- a) The Corporate Debtor has submitted that various credit facilities were sanctioned on various dates since 2014 which includes Stand By Letter of Credit and Guarantee facilities, including Term Loan and Cash Credit for meeting the working capital requirements of CORPORATE DEBTOR. The last modified sanction was on January 16, 2019 (SBLC & BG) wherein the applicant had modified the credit limits to the sanction letters dated March 25 and 26, 2014

- b) The applicant had issued a demand notice on 9 Sept 2020 that an amount of Rs164.26 crores was outstanding against a total limit of Rs.180.49 crores. However, from a perusal of the statement, it is observed that the principal amount outstanding on account of Bank guarantee/SBLC invoked account, the principal limit outstanding is mentioned as Rs92.08 crores and Rs 12.01 crores (limit of Rs.118.97 crores) respectively. There is no interest applied nor details of whether and when the Bank guarantee/SBLC were invoked to arrive at the exact date of its default. Subsequently another notice was served on 14 Sept 2022 under SARFESI Act U/s 13(2). However the demand notice states that the notice is issued only for the term loan facility and sub limit and not for other credit facilities. If the Bank Guarantees/SBLC continues to be a contingent liability and not invoked those limits are not repayable by the borrower and on default or invocation, the bank should have converted the liability in to an outstanding amount due and payable with immediate effect. The applicant has not provided correct details of the outstanding amount with interest due and payable by the respondent.
- c) From the Bank account statements enclosed in pages 591- 975, it is observed that the bank had provided Cash Credit account statement from 3 April 2014 to 22 April 2019 (outstanding of Rs

10.22 crores), Term Loan account from 22.9.2017 to 30 Nov 2018 (outstanding of Rs 49.80 crores) and Foreign Bank Guarantee Invoked Account starting from 1.1.2018 to 15.10.2023 (amounting to Rs.61.64 crores).

d) The Bank had issued a letter on Sept 1, 2023 offering a revised OTS for an amount of Rs.86 crores which was valid up to 30.9.2023 (there was earlier offer March 14, 2023 of Rs 100 crores by applicant) and in case of failure to comply with the same, the settlement shall be considered as failed and the bank reserves its rights to initiate to initiate appropriate proceedings. The respondent had sought extension of this OTS scheme to be extended till Feb end/March end (only as a precaution) and support to the corporate debtor as new investor had given a sanction and funds were expected. However, it was rejected. This application was filed on 20 October 2023.

e) It is observed from the application and submissions that there were other financial creditors to the respondent which includes ICICI Bank, HDFC, SBI, Standard Chartered Bank, Yes Bank and Kotak Mahindra Bank. HDFC Bank had filed an application before this Tribunal under Sec 7 of the IBC 2016 on 17 12 2021 which was adjudicated on 24 January 2023 and the application was rejected. As per the document filed by respondent, an OTS offer with similar conditions was offered to ICICI Bank, HDFC

Bank and Axis Bank. Subsequently HDFC Bank preferred an appeal before the NCAT and the OTS settlement was accepted and the HDFC bank was paid off its OTS amount sanctioned by the CORPORATE DEBTOR. The respondent had also paid the dues of Kotak Mahindra and Yes Bank meanwhile, as stated in its *reply of respondent*.

- f) The applicant has preferred this application after ICICI Bank filed an application under Section 7 of the IBC 2016 which is pending adjudication and reserved for orders. Both the banks conducted a meeting on 8 April 2024 as per the orders of this Tribunal dated 1 April 2024. However, they did not agree to restructure the loan or continue with the OTS and filed an affidavit on 18 April 2024. However, they did not conduct the meeting with all other financial creditors. Hon' ble NCLAT had vide its orders dated 18 March 2024 had after hearing the petition of the respondent observed that “in the ends of justice, we are of the view that the appellant and the investors as submitted before the Court may deposit the amount of Rs 167 crores along with 12% interest and Rs 87 crores plus 12% interest before the NCLT within 10 days as prayed by way of FDR in favour of Registrar NCLT. This was complied by the respondent and the amounts ordered were deposited with SBI(including interest) and compliance affidavit provided by the

New Investor and respondent. However, as directed by the Tribunal the meeting of all financial creditors was not conveyed, as was conducted earlier when HDFC Bank had moved the Sec 7 application. Only Axis Bank and ICICI Bank had conducted the meeting and decided to reject the proposal. One of the reasons stated was that the cash flows for repayment were routed through other banks and the repayments from the profits were not satisfactorily done. The applicant has also not stated as per prudential norms as to what extent they comprise of the debt exposure of the CD (whether 75% in value or 60% in number) in case of stressed assets which require a debt restructuring under the Joint Lenders Forum before preferring this insolvency application. The applicant has not also confirmed if the OTS was considered or not in terms of policy prescribed or approved by its board before proceeding with this application which was filed within a short notice of considering the proposal of OTS.

- g) The OTS offered could not be complied in time by the respondent who stated that the due diligence was to be completed and there was pending Sec 7 application. The new investor has now deposited in special escrow account. Extension of time was not considered by this applicant and there are lenders who have lent domestic and foreign currency lending separately, but underlying charge is connected by way of first charge or second

charge on hypothecated and fixed assets of the company. From the performance of the company it appears solvent and cash flows of sales have been shown and the corporate debtor has evinced interest to repay through OTS and revive. The banks even though have lent did not come together under a consortium or a Joint Forum to discuss the default (in the two banks who are applicants while the other two banks (SBI and Standard Chartered Bank) have stated that the accounts are standard.

h) While we are not ordering OTS to be considered, we observe extension was not considered appropriately, but now respondent has complied and made the payments kept in escrow account in terms of NCLAT orders. If the corporate debtor (respondent) is brought to insolvency, the position is the debt has to be resolved by sale of assets in favor of all creditors. Other wise, the respondent company even though NPA (with only 2 lenders and not others) has not been observed to be a wilful defaulter or is showing financial statements of erosion of net worth and the applicant is otherwise has adequate securities charged in its favour on which SARFESI Act has already been initiated.

i) The orders are reserved in other CP IB filed by ICICI Bank. Even though the debt is different, there is a linkage amongst various financial creditors, and the tribunal is not informed whether they complied with regulatory orders in identifying NPA and also

bringing such large exposure under a Joint Lenders forum to resolve or restructure the debt before filing this application as the respondent CD is observed to be solvent and is a going concern. OTS gives a mechanism for exit and re-schedulement of debt enables to continue the debt with concessions and restructure the loan holding the assets or creating additional charge in its favour. In common lending procedure, the issues have not been appropriately approached by the applicant as the respondent showed a continued response to offer OTS and exit. Even though the exposure created by the applicant are off balance sheet guarantees and letters of credit in order to arrive at limitation and recall the debt or restructure, the applicant has not complied with the prudential norms in recovering the dues as we are not able to exactly arrive at the date of default which would be date on which such guarantees/stand by letters of credits or ECB loans had devolved.

- j) The orders of this Tribunal in the earlier matter and the judgments quoted by applicant and the respondent are seen. The respondent has quoted the judgment of Hon' ble NCLAT in case of Anita Jindal v M/s Jindal Buildtech Pvt Ltd (Co Appeal AT(Ins) 512 of 2021 which is affirmed by Supreme Court in the case Vinay Yadav v Anita Jindal and others (CA 7600 of 2022) apart from other judgments and Swiss Ribbons Pvt Ltd V Union

of India & Others (2019). Vidarbha Industries V Power Limited V Axis Bank is also before us quoted by the respondent and a solvent entity with various contracts may come in to stand still if there is a moratorium imposed for resolution. The Debt due to multiple creditors and a default only in the case of 2 financial creditors had to be examined if there was a possibility of restructuring or accepting a OTS offered with both sides consent.

k) We observe that the corporate debtor a solvent entity, had offered adequate securities, has comfortable valuation of its assets but has defaulted with issues relating to payment particularly on long term debt and invoked guarantees and had short term constraints and has brought in a new investor. The Forum of lenders who are fully secured of the assets of the Corporate Debtor should have deliberated and decided on the matter for resolution as it is a large advance in terms of regulatory guidelines. The bank has independently preferred this application and has not stated the exposure of other lenders or the consent to file the application and if it is the largest creditor as per the norms prescribed with 70% of value and 60% in number or the applicant should have applied the appropriate policy of the bank in this regard and granted either time or considered an appropriate method to accept or reject the OTS proposal, restructure the loan under Joint Lenders Forum

especially when the offer was initially accepted and there was already a CIRP application filed by other creditor. The applicant apparently has not complied with the norms prescribed for multiple lending in case of stressed assets issued by regulatory authorities in time to prefer this application.

- 1) Amount of Debt as per application: R 61.99 crores which has been disbursed on various dates between April 2014 to May 2018. There are other contingent Standby letter of Credits which includes exposures in USD (cross border) and Guarantees issued which are stated to have been devolved. It appears the debt on default has been rolled over for quiet some time. The application has clearly not stated the date of default or the invoices or contracts which have not been paid to assess the limitation period for filing the application. It is further stated that after the final disbursement of Rs.3.05 crores in May 2018, the loan become an NPA on 10th Dec 2018. Further, it is stated that on 9 Sept 2020 a recall notice was issued for an amount of Rs.164.26 crores to be payable in 15 days. Further the applicant issued a notice under SARFESI Act on 14th Sept 2022 on the respondent and guarantors. There was no response from the respondent, who stated by letter on 31 Jan 2023 that he had financial difficulties and gave a proposal of OTS. The applicant further stated that there were exchanges of communication between

them and no OTS was finalised, and they filed an application on 28th Sept 2023 for an amount of Rs.216.82 crores with date of default as 30th Sept 2018 and date of NPA as 10th Dec 2018. The sanction by the applicant dated 25 March 2014 and board approval of the CD reveals that there is an exposure of Stand by Letter of Credit sanctioned for USD 24.50 crores apart from cash credit(working capital of Rs 10 crores). It has also granted certain LER limits for hedging currency exposures of Rs 14 crores. There are further exposures of Foreign Currency Term Loan and Buyers Credit granted or sourced from other banks from overseas (FCTL from JEID Dubai), expenditure for rig deployment at Algeria. Certain exposures have been created also to its subsidiary (CD) John Energy International DMCC through its branch at Dubai International financial Centre to the CD.

m)The application thus has given various documents and exposures which balloons the outstanding while it has not stated the first date of default correctly as to under which facility especially when certain off balance sheet exposure has been created to reckon the date of default of debt which has been contested by the respondent (that application is time barred). The submissions and written statements or affidavits do not clarify clearly the debt amount due in rupee exposure, other exposure including those invoked and date of default.

- n) The applicant has sanctioned certain limits for bank guarantee under consortium arrangement (letter dated May 8, 2015). *If so the applicant should have the consent of the consortium or move a joint application for insolvency.* Even though the applicant states that they had issued a demand notice on 10 Dec 2018, the copy has not been produced (though mentioned in application). The copy enclosed is issued on 9 9 2020 (date of default is 30 Sept 2018). This application has been filed on 20 Oct 2023.
- o) The respondent has stated that the applicant issued a demand notice and called for repayment within seven days (which was during the period under Sec 10 A of IBC 2016) and hence not maintainable. As per the OTS offered dated 14 March 2023 the CD had to pay Rs 100 crores and even so, in its offer to both ICICI bank and Axis Bank (two different applications under Sec 7 of IBC 2016 being adjudicated) the CD respondent has not acknowledged the individual limits but has offered a one time settlement which becomes conditional from both sides. *The applicant has also not produced all the relevant balance sheets after last acknowledgment by CD.* It has not been able to prove whether the application filed is not time barred, clearly due to the various gaps in the documents and statements filed of its exposure to the CD.

- p) The applicant has not sought the approval of the other financial creditors or their consent or dissent in pursuing this insolvency application which becomes applicable in case of large stressed assets with multiple or consortium exposure where the charges on assets are also demarcated accordingly amongst various creditors. It has the amount offered under OTS credited in compliance of NCLAT order.
- q) The Hon'ble Supreme Court in the case of Swiss Ribbons Pvt. Ltd. vs. Union of India & Ors., (2019) 4 SCC 17 has held that the primary focus of the legislation is to ensure revival and continuation of the Corporate Debtor and not simply the recovery of debt.
- r) The law laid down by the Hon'ble Apex Court in Vidarbha Industries Power Ltd. (2022) 8 SCC 352 squarely applies to the facts of present case as the company is solvent otherwise, and has to be restructured within the process of regulatory frame work given to the creditors before triggering insolvency *or the creditor has to pursue an independent exit route with the borrower.*
- s) The CD has produced relevant documents to prove its solvency and two major creditors have not agreed to file this insolvency petition and are treating the accounts as

standard. Further there are adequate securities and valuation satisfactory to the amount of Debt and the OTS amount offered has been complied, reasons for delay clearly explained before this Tribunal.

- t) Also the application is to be viewed from the angle of limitation as the documents do not clearly prove the date of default, the interest charge, continuation of documents after invocation of guarantees to keep the debt alive under limitation period for filing a recovery notice including date of submission of this application within the period of limitation under Sec 238 A of IBC 2016. OTS offer by the respondent clearly is conditional and if the applicant is to be given the comfort of extension of limitation the entire debt has not been acknowledged as the relevant and continuous balance sheets of the CD has not been provided.
- u) In view of the above, we pass the following order.

ORDER

The applicaton CP(IB) No.288 of 2023 is rejected.

-Sd-

DR. V. G. VENKATA CHALAPATHY
MEMBER (TECHNICAL)

-Sd-

CHITRA HANKARE
MEMBER (JUDICIAL)