

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH, COURT-I
KOLKATA**

TP No. 29/KB/2021

A petition under section 7 of the Insolvency and Bankruptcy Code, 2016.

In the matter of:

**Tata Capital Financial Services Limited
[CIN: U67100MH2010PLC210201]**

...Financial Creditor

Versus

**Kalpataru Vanijya Private Limited
[CIN: U51909WB2005PTC106223]**

...Corporate Debtor

Date of pronouncement: 24.04.2024

Coram:

Rohit Kapoor : **Member (Judicial)**
Balraj Joshi : **Member (Technical)**

Appearances (through video conferencing):

For the Financial Creditor : Mr. Avishek Guha, Adv.
Ms. Arunika Dutta, Adv.

For the Corporate Debtor : Ms. Rashmi Singhee, Adv.
Ms. Madhuj Barman, Adv

ORDER

Per Balraj Joshi, Member (Technical)

1. This Court convened through hybrid mode.
2. This is a Company Petition filed under section 7 of the Insolvency and Bankruptcy Code, 2016 by, Tata Capital Financial Services Limited represented by **Mr. Prahlad Khale**, the Associate Vice President Legal-Commercial Finance of the Financial

Creditor seeking to initiate Corporate Insolvency Resolution Process (“CIRP”) against Kalpataru Vanijya Private Limited (“Corporate Debtor”).

3. The Corporate Debtor is a Private limited company incorporated on 21.11.2005. The authorized share-capital of the company ₹ 50,00,000/- and the paid-up share capital of the company is ₹ 33,60,000/-.

Submissions on behalf of the Financial Creditor

4. The case of the Petition is that it is the Financial Creditor of the company, had instituted Company Petition No 632 of 2016 against the Corporate Debtor herein, under provisions of sections 433, 434 and 439 of the Companies Act, 1956 before the Hon’ble High Court of Calcutta praying inter alia that the Corporate Debtor be wound up.
5. The said CP 632 of 2016 was found to be in pre-admission stage and in view of *Action Ispat and Power Pvt. Ltd. Vs. Shyam Metalics and Energy Ltd, 2020 SCC Online SC 1025* Hon’ble High Court of Calcutta transferred this matter to the National Company Law Tribunal, Kolkata.
6. The said CP No. 632 of 2016 has been transferred to this Adjudicating Authority and has been numbered as TP No 29/KB/2021. The Financial Creditor herein has substantial stake and interest in the present matter as huge claims are due and payable by the Corporate Debtor to the Financial Creditor herein.
7. The Financial Creditor (referred to herein as the 'FC') extended a Working Capital Demand Loan facility amounting to Rs. 1,75,00,000/- pursuant to a sanction letter dated August 14, 2012, for a term of 12 months. Subsequently, a working capital term loan agreement was executed on September 6, 2012, between the parties, accompanied by the creation of various securities to secure the loan. Thereafter, on February 13, 2013, the said facility was augmented to Rs. 2,25,00,000/- through a sanction letter¹.

¹ Annexure-B: Page 52, Volume-I; Annexure-C: Page 57, Volume-I; Annexure-Q: Page 208, Vol-II of application

8. At the behest of the Corporate Debtor (hereinafter referred to as the 'CD'), the FC, by means of a letter dated March 24, 2015, further extended the aforementioned loan facility to the amount of **Rs. 2,51,01,510/-** (Rupees Two crores fifty-one lakhs one thousand and five hundred ten), valid until June 23, 2015². The CD acknowledged its debt of the aforementioned loan facilities through confirmation of balance letters³ dated February 28, 2014, March 18, 2014, and March 24, 2015, respectively.
9. Subsequent to the aforementioned extensions, despite repeated reminders, the CD defaulted in fulfilling its repayment obligations. Eventually, the FC issued a letter dated October 13, 2015, and a notice dated December 9, 2023⁴, urging the CD to settle all outstanding payable dues amounting to Rs. 2,51,01,510/-.
10. Upon the failure of the CD to discharge the aforementioned debt to the FC, the FC issued a Statutory Demand Notice under Section 434 of the Companies Act, 1956, demanding the payment of Rs. 2,51,01,510/-. The computation of this amount is delineated on **Page 30, Volume 1** of the application.
11. Subsequent to its filing on June 29, 2016, the aforementioned application remained pending adjudication. By virtue of an order dated February 26, 2021, the said application was transferred to this Adjudicating Authority. Upon its transfer to this Adjudicating Authority, the Application was made compliant with the Insolvency and Bankruptcy Code (IBC) by submitting a Form 2, accompanied by the consent of the Interim Resolution Professional, through a Supplementary Affidavit. This IBC compliant application was duly served upon the Corporate Debtor (CD). The financial creditor has also proposed a name of the Interim Resolution Professional.
12. The sum asserted to be in arrears by the Financial Creditor amounts to Rs. 2,51,01,510/- (Rupees Two Crores Fifty-One Lakh One Thousand Five Hundred Ten) as of **6th January, 2016**, coinciding with the issuance of the statutory notice pursuant to Section

² Annexure-PP: Page 367, Volume-III of application

³ Annexure-EE: Page 324, Volume-III; Annexure-NN: Page 361, Volume-III; Annexure-QQ: Page 368, Volume-III of application

⁴ Annexure-SS: Page 370, Volume-III; Annexure-WW: Page 378, Volume-III of application

434 of the Companies Act, 1956. The date of default concerning the debts delineated in the petition is 13th October, 2015 (referenced on Page 370 of the petition).

Reply Affidavit on behalf of the Corporate Debtor

13. It is asserted that in or around August 2012, the Corporate Debtor, represented by its authorized agent, approached the Financial Creditor to obtain a Working Capital on Demand Loan Facility amounting to Rs. 1,75,00,000/- (Rupees One Crore Seventy-Five Lakhs only) ("hereinafter referred to as the facility"). Following extensive discussions and negotiations, and upon compliance by the Corporate Debtor with the terms and conditions set forth by the Financial Creditor, the Financial Creditor approved the working capital demand loan facility in the sum of Rs. 1,75,00,000/- via its Sanction Letter dated 14th August 2012.
14. Subsequently, a working capital demand loan agreement dated 6th September 2012 was executed between the parties. Both the sanction letter and the loan agreement delineated specific terms and conditions governing the loan as well as the repayment schedule to be adhered to by the Corporate Debtor. Moreover, the Corporate Debtor executed various security instruments in favor of the Financial Creditor.
15. Additionally, around February 2013, the Corporate Debtor made a request to the Financial Creditor for the renewal and augmentation of the credit facility by an additional sum of Rs. 50,00,000/- (Rupees Fifty Lakhs only), thereby extending the loan limit to Rs. 2,25,00,000/- (Rupees Two Crores Twenty-Five Lakhs only). The Financial Creditor acceded to the Corporate Debtor's request, as evidenced by the Renewal cum Enhancement of Credit Facility letter dated 13th February 2013. Consequently, a Supplemental Agreement dated 14th February 2013 was executed between the parties to formalize the augmentation of the facility/loan amount to Rs. 2,25,00,000/-. Thereafter, the aforementioned facility underwent periodic renewals, accompanied by the execution of various security documents by the Corporate Debtor in favor of the Financial Creditor.

16. Nevertheless, the Corporate Debtor acknowledges instances of default in meeting payment obligations promptly. Consequently, a notice dated 9th December 2015 was dispatched by the Financial Creditor to the Corporate Debtor, demanding immediate repayment of Rs. 2,46,58,986/- (Rupees Two Crores Forty-Six Lakhs Fifty-Eight Thousand Nine Hundred and Eighty-Six only) outstanding as of 4th December 2015, inclusive of interest at a rate of 14% per annum and additional interest at 6% per annum from 5th December until the date of payment realization. Regrettably, the Corporate Debtor did not receive the said notice, hence no formal response was issued on its behalf.
17. Subsequently, the Financial Creditor pursued arbitration proceedings against the Corporate Debtor, resulting in an arbitration award against the latter. It is pertinent to note that the arbitration proceedings concerned the disputed amount, which is also the subject of contention in the ongoing Section 7 application. Consequently, it is arguable that the dispute in question is triable and cannot be conclusively resolved through summary proceedings under the Insolvency and Bankruptcy Code (IBC).
18. The arbitration award has not achieved finality, as there remains a statutory period within which it can be challenged, a right which the Corporate Debtor has not exercised thus far. Therefore, the award, lacking finality, cannot constitute a "debt" within the purview of the Code. If the debt has yet to crystallize, it cannot serve as the basis for commencing Corporate Insolvency Resolution Process (CIRP).
19. Furthermore, it is alleged that the Financial Creditor extended loan facilities to three other entities affiliated with the Corporate Debtor, subsequent to the execution of various security documents. It is contended that the Financial Creditor sold the securities provided by these entities at a value lower than their actual valuation. Moreover, the proceeds received by the Financial Creditor were set off against the outstanding loan amount; however, the securities and/or properties were purportedly sold at undervalued prices. The Corporate Debtor seeks permission to present pertinent documents supporting these claims during the scheduled hearing.

20. The petition is subject to dismissal at its inception due to lack of proper authorization and contravention of statutory provisions. The petitioner lacks authority under the Companies Act or any other legislation to initiate such proceedings. Additionally, the petition fails to meet the prerequisites necessary for the issuance of a winding-up order under the Companies Act, 1956 and/or Companies Act 2013 ("the Act").
21. Furthermore, it is emphasized that the Insolvency and Bankruptcy Code, 2013 (IBC) holds supremacy over other laws, as stipulated in Section 238 of the Code. Consequently, the present application must be filed in accordance with Section 7 of the Code, given that the petitioner is identified as a financial creditor in this instance.
22. The petition does not substantiate any grounds under Sections 433, 434, and 439 of the Companies Act 1956, warranting the issuance of a winding-up order. Moreover, the petitioner lacks the right or authority to commence proceedings under Sections 433, 434, and 439 of the Companies Act 1956.
23. It is underscored that the provisions of the Code differ from those of the Companies Act, 1956, which have diminished in significance following the enactment of the Code in 2016. The structure of the IBC establishes the National Company Law Tribunal (NCLT) as a distinct and separate forum, not subordinate to the Company Court constituted under the Companies Act, 1956.
24. According to the principles of statutory interpretation, the general law should yield to the special law. In the context of the current statute, the Companies Act serves as the general law, while the Code operates as a special statute, particularly concerning the provisions relating to the revival or resolution of companies under Chapter II of the IBC.
25. Even if the Companies Act, 1956, and the Code are regarded as special statutes operating within their respective spheres, it can be argued that the Code, being a subsequent enactment and in consideration of its objectives and purposes, must accord primacy to the provisions related to the revival/resolution of companies incorporated under Chapter II over the winding-up provisions pending before the Company Courts.

Analysis and Findings

26. Heard the Ld. Counsel on behalf of the Applicant and the Ld. Counsel on behalf of the Respondents and perused the records.

27. To address the matter of transferring winding up proceedings to this Adjudicating Authority, it is pertinent to commence with a comprehensive examination of Section 434 of the Companies Act, 2013, with specific emphasis on its fifth proviso. The verbatim text of Section 434 is provided below for reference:

434. Transfer of certain pending proceedings.--(1) On such date as may be notified by the Central Government in this behalf,--

(a) all matters, proceedings or cases pending before the Board of Company Law Administration (herein in this Section referred to as the Company Law Board) constituted Under Sub-section (1) of Section 10-E of the Companies Act, 1956, immediately before such date shall stand transferred to the Tribunal and the Tribunal shall dispose of such matters, proceedings or cases in accordance with the provisions of this Act;

(b) any person aggrieved by any decision or order of the Company Law Board made before such date may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Company Law Board to him on any question of law arising out of such order:

Provided that the High Court may if it is satisfied that the Appellant was prevented by sufficient cause from filing an appeal within the said period, allow it to be filed within a further period not exceeding sixty days; and

(c) all proceedings under the Companies Act, 1956, including proceedings relating to arbitration, compromise, arrangements and reconstruction and winding up of companies, pending immediately before such date before any District Court or High Court, shall stand

transferred to the Tribunal and the Tribunal may proceed to deal with such proceedings from the stage before their transfer:

Provided that only such proceedings relating to the winding up of companies shall be transferred to the Tribunal that are at a stage as may be prescribed by the Central Government:

Provided further that only such proceedings relating to cases other than winding up, for which orders for allowing or otherwise of the proceedings are not reserved by the High Courts shall be transferred to the Tribunal:

Provided also that--

(i) all proceedings under the Companies Act, 1956 other than the cases relating to winding up of companies that are reserved for orders for allowing or otherwise such proceedings; or

(ii) the proceedings relating to winding up of companies which have not been transferred from the High Courts;

shall be dealt with in accordance with provisions of the Companies Act, 1956 and the Companies (Court) Rules, 1959:]

Provided also that proceedings relating to cases of voluntary winding up of a company where notice of the resolution by advertisement has been given Under Sub-section (1) of Section 485 of the Companies Act, 1956 but the company has not been dissolved before the 1st April, 2017 shall continue to be dealt with in accordance with provisions of the Companies Act, 1956 and the Companies (Court) Rules, 1959:

Provided further that any party or parties to any proceedings relating to the winding up of companies pending before any Court immediately before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018, may file an application for transfer of such proceedings and the Court may by order transfer such proceedings to the Tribunal and the proceedings so transferred shall be dealt with by the Tribunal as an application for initiation of

corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016 (31 of 2016).

(2) The Central Government may make Rules consistent with the provisions of this Act to ensure timely transfer of all matters, proceedings or cases pending before the Company Law Board or the courts, to the Tribunal under this section.

28. Further, it is relevant to refer to refer to Rule 5 of the Companies (Transfer of Pending Proceedings) Rules, 2016, which is reproduced hereinafter:

“5. Transfer of pending proceedings of Winding up on the ground of inability to pay debts.—

(1) All petitions relating to winding up under clause (e) of Section 433 of the Act on the ground of inability to pay its debts pending before a High Court, and where the petition has not been served on the respondent under Rule 26 of the Companies (Court) Rules, 1959 shall be transferred to the Bench of the Tribunal established under sub-section (4) of Section 419 of the Companies Act, 2013 exercising territorial jurisdiction and such petitions shall be treated as applications under Sections 7, 8 or 9 of the Code, as the case may be, and dealt with in accordance with Part II of the Code:

Provided that the petitioner shall submit all information, other than information forming part of the records transferred in accordance with Rule 7, required for admission of the petition under Sections 7, 8 or 9 of the Code, as the case may be, including details of the proposed insolvency professional to the Tribunal upto 15th day of July, 2017, failing which the petition shall stand abated:

Provided further that any party or parties to the petition shall, after the 15th day of July, 2017, be eligible to file fresh applications under Sections 7 or 8 or 9 of the Code, as the case may be, in accordance with the provisions of the Code:

Provided also that where a petition relating to winding up of a company is not transferred to the Tribunal under this Rule and remains in the High Court and where there is another petition under clause (e) of Section 433 of the Act for winding up against the same company pending as on 15th December, 2016, such other petition shall not be transferred to the Tribunal, even if the petition has not been served on the respondent.”

29. Further, we refer to the decision rendered by the Hon’ble Supreme Court in the matter of ***Forech India Ltd. vs. Edelweiss Assets Reconstruction Co. Ltd.***⁵ wherein the Apex Court has held as follows:

“The resultant position in law is that, as a first step, when the Code was enacted, only winding up petitions, where no notice under Rule 26 of the Companies (Court) Rules was served, were to be transferred to the NCLT and treated as petitions under the Code. However, on working of the Code, the Government realized those parallel proceedings in the High Courts as well as before the adjudicating authority in the Code would stultify the objective sought to be achieved by the Code, which is to resuscitate the corporate debtors who are in the red.

In accordance with this objective, the Rules kept being amended, until finally Section 434 was itself substituted in 2018, in which a proviso was added by which even in winding up petitions where notice has been served and which are pending in the High Courts, any person could apply for transfer of such petitions to the NCLT under the Code, which would then have to be transferred by the High Court to the adjudicating authority and treated as an insolvency petition under the Code.”

(Para 17)

⁵(22.01.2019 - SC): MANU/SC/0080/2019

30. In the present case, with the existence of debt coupled with default and the application being IBC, the application is complete in terms of Section 7 of the code and therefore are satisfied that it warrants the appropriate admission of the Corporate Debtor for the commencement of Corporate Insolvency Resolution Process (CIRP).

31. Accordingly, it is, hereby ordered as follows:-

- (a) The Corporate Debtor i.e., **Kalpataru Vanijya Private Limited** is *admitted* into Corporate Insolvency Resolution Process (CIRP).
- (b) There shall be a moratorium under section 14 of the IBC.
- (c) The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.
- (d) Public announcement of the CIRP shall be made immediately as specified under section 13 of the Code read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- (e) *Mrs. Renuka Devi Rangaswamy*, registration number **IBBI/IPA-001/IP-P-01863/2019-2020/12871**, email: jrassociatescbe@gmail.com, is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the Code subject to submission of a valid Authorisation of Assignment in terms of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016. The fee payable to IRP or the RP, as the case may be, shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the Code.
- (f) During the CIRP period, the management of the Corporate Debtor shall vest in the IRP or the RP, as the case may be, in terms of section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish information in their knowledge to the IRP within one week

from the date of receipt of this Order, in default of which coercive steps will follow. No separate notice for cooperation by the suspended management should be expected.

- (g) The IRP/RP shall submit to this Adjudicating Authority periodical report with regard to the progress of the CIRP in respect of the Corporate Debtor.
- (h) The Applicant being the Financial Creditor shall deposit a sum of **Rs 2,00,000/- (Rupees Two Lakhs only)** with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC).
- (i) In terms of section 7(5)(a) of the Code, Court Officer of this Court is hereby directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the IRP by Speed Post and email immediately, and in any case, not later than two days from the date of this Order.
- (j) Additionally, the Applicant herein shall serve a copy of this Order on the IRP and on the Registrar of Companies, West Bengal, Kolkata by all available means for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this order.

32. **TP (IB) No. 29/KB/2021** to come up on **17.05.2024** for filing periodical report.

33. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities

[Balraj Joshi]
Member (Technical)

[Rohit Kapoor]
Member (Judicial)

This order is pronounced on the 24th day of April, 2024.

A.J.S