

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH (COURT- II)
KOLKATA**

C.P. (IB) NO. 132/KB/2023

In the Matter of:

The Insolvency and Bankruptcy Code, 2016

And

In the Matter of:

Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016;

And

In the Matter of:

SREI Equipment Finance Limited,

Represented by Mr. Rajneesh Sharma, Administrator (A Company under Corporate Insolvency Resolution Process vide Order dated October 8, 2021 passed by the Hon'ble National Company Law Tribunal, Kolkata Bench), a company within the meaning of Companies Act, 2013, having its registered office at "VISWAKARMA", 86C, Topsia Road (South), Kolkata – 700046, West Bengal.

.... Financial Creditor / Petitioner.

Versus

SKY Infra Logistics Private Limited

A Company within the meaning of Companies Act, 1956, having its registered office at Rajshree Apartments 6, Hastings Park Road, P.S. Alipore, Kolkata, West Bengal 700027 IN;

.... Corporate Debtor / Respondent.

Date of pronouncing the order: 01/05/2024.

CORAM:

Smt. Bidisha Banerjee: Hon'ble Member (Judicial)

Shri D. Arvind: Hon'ble Member (Technical)

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Appearances (Physically/ via video conference)

- | | |
|---------------------------------------|------------------------------|
| 1) Mr. Sankarsan Sarkar, Adv. |] For the Financial Creditor |
| 2) Mr. Aditya Kanodia, Adv. |] |
| 3) Mr. Tanmoy Sett, Adv. |] |
| 4) Ms. Suparna Sardar, Adv. |] |
| | |
| 5) Mr. Abhishek Swarup, Adv. |] For the Corporate Debtor |
| 6) Ms. Diottima Roy, Adv. |] |
| | |
| 1) Mr. Biswanath Chatterjee, Adv. |] For the Intervenor |
| 2) Mr. Soham Krishna Chatterjee, Adv. |] |

ORDER

Smt. Bidisha Banerjee, Member (Judicial)

1. The court congregated through a hybrid mode.
2. This application has been preferred by **SREI Equipment Finance Limited**, the **Financial Creditor** to seek initiating the Corporate Insolvency Resolution Process against **SKY Infra Logistics Private Limited**, the **Corporate Debtor** for a default of **Rs.2,73,17,117/-** on **15.12.2019**.
3. Learned Counsel for the Financial Creditor, Ld. Counsel for the Corporate Debtor and Ld. Counsel for the Intervenor were heard at length.
4. The summation and summarisation of the Creditor's case is as under:
 - 4.1 The Corporate Debtor approached the Financial Creditor for grant of loan amounting to Rs.1,15,00,000/-. A loan agreement was executed by and between the Financial Creditor and Corporate Debtor, being contract No.180869

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dated September 15, 2019. Several documents were also executed by and between the parties herein in order to secure the said loan, including creation of mortgage by depositing title deeds to the Financial Creditor.

4.2 Since the Corporate Debtor failed to repay even the first instalment of the said loan, which was due on December 15, 2019, the Financial Creditor recalled the said loan and requested the Corporate Debtor to repay the entire principal amount along with accrued interest thereon. As such, the date of default for the said debt is December 15, 2019.

4.3 The Financial Creditor invoked the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "SARFAESI Act, 2002") before the Debt Recovery Tribunal, Kolkata (for short "DRT").

4.4 It is well settled that an application under Section 7 of IBC, 2016, before this Tribunal is maintainable during pendency of a proceeding before the DRT under the SARFAESI act, 2002 in respect of the same debt.

4.5 Section 7 of IBC, 2016 comes into play when the Corporate Debtor commits "default". Section 7 of IBC, 2016, thus uses the expression "default" and not the date of notifying the loan account of the corporate person as a Non-Performing Asset (for short "NPA"). Further the expression "default" has been defined in Section 3(12) of IBC, 2016 to mean non-payment of "debt" when the whole or any part or an instalment of the amount of debt has become due and

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payable and is not paid by the Corporate Debtor to the Financial Creditor. The expression “date of default” does not mean it has to be the “date of NPA” as per guidelines issued by the Reserve Bank of India.

4.6 In the instant case, the Corporate Debtor failed to repay the first instalment of EMI which was due and payable on December 15, 2019. As such, the date of default ought to be December 15, 2019 and not the date of NPA.

4.7 Section 10A of IBC, 2016 provides that no application / proceedings under Section 7, 9 and 10 of IBC, 2016 can be initiated for a default committed during Section 10A period, which is between March 25, 2020 till March 25, 2021. Since the default was committed prior to Section 10A period and liability to pay interest having clocked prior to Section 10A period, the Corporate Debtor is liable to pay interest during the Section 10A period and the interest component is to be considered and to be computed for achieving the threshold limit for triggering Corporate Insolvency Resolution Process (for short “CIRP”). Under such circumstances, the said application under Section 7 of IBC, 2016 meets the threshold limit and is not barred.

5. The Creditor has relied upon the following decisions to establish his claim:

i) In Civil Appeal No.1650 of 2020 decided on August 4, 2021, “Dena Bank (Now Bank of Baroda) – versus – C. Shivakumar Reddy and Anr.” – “Final judgment and/or decree of any court or tribunal or any arbitral award for

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payment of money, if not satisfied, would fall within the ambit of a financial debt”.

ii) In Company Appeal (AT) (CH) (Ins) No.130 of 2022 decided on **May 11, 2022**, **“Amar Vora – Versus – City Union Bank Ltd. Represented by its Manager, Renganath and Anr.”** – *“financial Creditor/ Operational Creditor/ Corporate Persons can file an application under Section 7, 9 & 10 of the I & B Code, 2016 before the respective Adjudicating Authorities even though in respect of same any proceeding pending before other forums on the ground that the provisions of I & B Code, 2016 is overriding effect of other laws.”*

iii) In Civil Appeal No.2734 of 2020 decided on **March 26, 2021**, **“Laxmi Pat Surana – versus – Union Bank of India and Anr.”** and

iv) in Company Appeal (At) (Insolvency) No.840 of 2021 decided on **December 22, 2022**, **“Edelweiss Asset Reconstruction Company Limited – versus – Perfect Engine Components Pvt. Ltd.”** – *“ ‘date of default’ does not mean a strict interpretation that it has to be the ‘date of NPA’ in fact, the ‘date of default’ defined under Section 3(12) of the Code is to mean ‘non-payment of a date which has become ‘due and payable’ ”*

6. Per Contra: -

The Respondent Debtor would contend that: -

6.1 The Petitioner had sent demand notice dated 06.10.2020 under Section 13(2) of the SARFAESI Act, 2002, thereby

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calling upon the Respondent to pay the outstanding dues of Rs.1,38,41,281/- (self-calculated by them) within 60 days from date of receipt of the notice.

- 6.2** Subsequent thereto, the authorized officer of Petitioner in exercise of powers conferred under Section 13(12) of the SARFAESI Act 2002 read with Rule 9 of the Security Interest (Enforcement) Rules, 2002 took possession of the property of the Respondent on 14.12.2020 and is recovering money by earning profits from that property, which fact the Petitioner has deliberately concealed.
- 6.3** That the possession of the property was taken in the month of December, 2020, while the present petition has been filed in the month of July, 2023 i.e. after a long period of about 3 years. The Petitioner had opted to realise the profits from the property and has recovered the money. The present petition titled after a long period of about 3 years clearly shows the intent of Petitioner to take double benefit i.e. first by recovering money through profits of using the property for around 3 years and later on file the present petition to allegedly recover the outstanding dues.
- 6.4** That the value of the property in their possession is more than Rs.2.5 Crores and for either of the purposes i.e. auctioning or leasing, the property is highly valuable.
- 6.5** That the Hon'ble Supreme Court in ***M/s S.S. Engineers & Ors. Versus Hindustan Petroleum Corporation Ltd.*** in **CIVIL APPEAL NO. 4583 OF 2022**, has held that,

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“31. The NCLT, exercising powers under Section 7 or Section 9 of IBC, is not a debt collection forum. The IBC tackles and/or deals with insolvency and bankruptcy. It is not the object of the IBC that CIRP should be initiated to penalize solvent companies for non-payment of disputed dues claimed by an operational creditor.”

6.6 Further that the total debt is divided into 33 equal instalments of Rs.4,31,800/- and last instalment of Rs.2,19,339/-, which comes to a total of Rs.1,44,68,739/-. The instalments that fell due during the Section 10A period totals Rs.51,81,600/-. If we subtract Rs. 51,81,600/- from the total debt of Rs. 1,44,68,739/-, the amount comes to Rs.92,87,139/-, which is below the threshold limit prescribed under the IBC, 2016. As such, the present claim cannot be entertained by this Hon’ble Tribunal as it is below the prescribed threshold limit.

6.7 The Petitioner’s calculation of Rs. **2,73,17,117/-** is completely wrong, especially in view of the fact that the date of default mentioned by the Petitioner itself is the date on which the monthly instalments commenced.

- 7.** We have considered the rival contentions and perused records.
- 8.** The alleged default is **Rs.2 Crore 73 Lakh** and odds including the principal amount of **Rs.1 Crore 15 Lakh** and odds that crosses the prescribed threshold of Rs.1 Crore.

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9. The date of default is **15.12.2019** when the Debtor defaulted in paying its first instalment.
10. Excluding the Section 10A period, the total claim calculated would be as under: -

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Calculation Sheet Excluding 10A Period						
Instalments Default Calculation						Total Amount in Default
Contract No	Date on which default occurred	Instalments Default (Rs) before 25-03-2020	Instalments Default (Rs) after 31-03-2021	Overdue Interest (Rs) before 25-03-2020	Overdue Interest (Rs) after 31-03-2021	
180869	15-12-2019	4,31,800	-	-	-	4,31,800
180869	15-01-2020	4,31,800	-	13,390	-	4,45,190
180869	15-02-2020	4,31,800	-	27,195	-	4,58,995
180869	15-03-2020	4,31,800	-	38,716	-	4,70,516
180869	15-04-2020	-	-	-	-	-
180869	15-05-2020	-	-	-	-	-
180869	15-06-2020	-	-	-	-	-
180869	15-07-2020	-	-	-	-	-
180869	15-08-2020	-	-	-	-	-
180869	15-09-2020	-	-	-	-	-
180869	15-10-2020	-	-	-	-	-
180869	15-11-2020	-	-	-	-	-
180869	15-12-2020	-	-	-	-	-
180869	15-01-2021	-	-	-	-	-
180869	15-02-2021	-	-	-	-	-
180869	15-03-2021	-	-	-	-	-
180869	15-04-2021	-	4,31,800	-	2,70,545	7,02,345
180869	15-05-2021	-	4,31,800	-	2,82,754	7,14,554
180869	15-06-2021	-	4,31,800	-	3,14,481	7,46,281
180869	15-07-2021	-	4,31,800	-	3,26,570	7,58,370
180869	15-08-2021	-	4,31,800	-	3,61,139	7,92,939
180869	15-09-2021	-	4,31,800	-	3,85,727	8,17,527
180869	15-10-2021	-	4,31,800	-	3,97,620	8,29,420
180869	15-11-2021	-	4,31,800	-	4,36,797	8,68,597
180869	15-12-2021	-	4,31,800	-	4,48,550	8,80,350
180869	15-01-2022	-	4,31,800	-	4,91,030	9,22,830
180869	15-02-2022	-	4,31,800	-	5,19,646	9,51,446
180869	15-03-2022	-	4,31,800	-	4,95,270	9,27,070
180869	15-04-2022	-	4,31,800	-	5,77,897	10,09,697
180869	15-05-2022	-	4,31,800	-	5,89,263	10,21,063
180869	15-06-2022	-	4,31,800	-	6,40,869	10,72,669
180869	15-07-2022	-	4,31,800	-	6,52,062	10,83,862
180869	15-08-2022	-	4,31,800	-	7,07,741	11,39,541
180869	15-09-2022	-	2,19,340	-	7,43,077	9,62,416
180869	17-12-2022	-	-	-	23,91,406	23,91,406
Total Claim after excluding the 10A Period upto 17-12-2022						2,03,98,886
* Overdue Interest Post 17-12-2022 is also continuing to accrued						

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- 11.** As the amount meets the prescribed threshold limit in terms of Section 4 of IBC, we feel no hesitation in admitting the current **C.P. (IB) NO. 132/KB/2023**.
- 12.** Thus, in terms of the enumerations supra, we **ALLOW** this instant application bearing **C.P. (IB) NO. 132/KB/2023** filed under **Section 7 of the I&B Code**, and accordingly, we order the initiation of the **Corporate Insolvency Resolution Process (CIRP)** in respect of the Corporate Debtor by the following **Orders:**
- i.** The Application filed by **SREI Equipment Finance Limited (Financial Creditor)**, under Section 7 of the Insolvency & Bankruptcy Code, 2016, is hereby, **ADMITTED** for initiating the **Corporate Insolvency Resolution Process** in respect of **SKY Infra Logistics Private Limited (Corporate Debtor)**.
 - ii.** As a consequence of this Application being admitted in terms of Section 7 of the I&B Code, moratorium as envisaged under the provisions of Section 14(1) of the Code, shall follow in relation to the Respondent/Corporate Debtor, as per clauses (a) to (d) of Section 14(1) of the Code. However, during the pendency of the moratorium period, terms of Section 14(2) to 14(3) of the Code shall come into force.
 - iii.** Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016, prohibits the following, as:

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- 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 asset 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 (54 of 2002);*
- d. *The recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.*

[Explanation.--For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;]

- iv. The supply of essential goods or services to the corporate debtor as may be specified shall not be

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terminated or suspended or interrupted during the moratorium period.

- v. The provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- vi. The Applicant has proposed the name of **“Mr. Neeraj Kejriwal”**, Address: P-178, CIT Scheme VI-M, 3rd Floor, Kolkata - 700054, West Bengal, India Email: nkejriwal.ip@gmail.com Registration No. **IBBI/IPA-001/IP-P00392/2017-18/10710**, as the “IRP”. We have perused that there is a written communication and consent of IRP in Form 2 with Affidavit, annexed at Pages 61 and 62 to the application, as per the requirement of Rule 9(l) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. There is a declaration made by him that there are no disciplinary proceedings pending against him with the Board or ICSI Institute of Insolvency Professionals. In addition, further necessary disclosures have been made by **“Mr. Neeraj Kejriwal”** as per the requirement of the IBBI Regulations. Accordingly, he satisfies the requirement of Section 7(3)(b) of the code. Hence, we appoint **“Mr. Neeraj Kejriwal”** as the **Interim Resolution Professional** (IRP) of the Corporate Debtor to carry out the functions as per the I&B Code subject to submission of a valid Authorisation of Assignment in terms of regulation 7A of the Insolvency

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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 I&B Code.

- vii.** In pursuance of Section 13 (2) of the Code, we direct the IRP or the RP, as the case shall cause a public announcement immediately with regard to the admission of this application under Section 7 of the Code and **call for the submission of claims** under Section 15 of the Code. The public announcement referred to in Clause (b) of sub-section (1) of Section 15 of the Insolvency & Bankruptcy Code, 2016, shall be made immediately. The expression immediately means within three days as clarified by Explanation to Regulation 6 (1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- viii.** During the CIRP period, the management of affairs of the Corporate Debtor shall vest in the IRP or the RP, as the case may be, in terms of Section 17 of the I&B Code. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every 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. There shall be no future opportunities in this regard.

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- ix.** The Interim Resolution Professional is also free to take police assistance to take full charge of the Corporate Debtor, its assets and its documents without any delay, and this Court hereby directs the concerned **Police Authorities** and/or the **Officer-in-Charge** of Local Police Station(s) to render all assistance as may be required by the Interim Resolution Professional in this regard.
- x.** The IRP or the RP, as the case may be, shall submit to this Adjudicating Authority periodical report with regard to the progress of the CIRP in respect of the Corporate Debtor.
- xi.** The Financial Creditors shall be liable to pay to IRP a sum of **Rs.3,00,000/-** (Rupees Three Lakh Only) as payment of his fees as advance, as per Regulation 33(3) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, which amount shall be adjusted at the time of final payment. The expenses relating to the CIRP are subject to the approval of the Committee of Creditors (CoC).
- xii.** In terms of sections 7(5) and 7(7) of the Code, the **Registry of this Adjudicating Authority** is hereby directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the Interim Resolution Professional by Speed Post and through email immediately, and in any case, not later than two days from the date of this Order.

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- xiii.** Additionally, the **Registry of this Adjudicating Authority** shall serve a copy of this Order upon the Insolvency and Bankruptcy Board of India (IBBI) for their record and also upon the Registrar of Companies (RoC), to whom the company(ies) are registered with, 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.
- xiv.** The Resolution Professional shall conduct CIRP in a time-bound manner as per Regulation 40A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016.
- xv.** The IRP/RP shall be liable to submit the periodical report including the minutes of the CoC of the Corporate Debtor, with regard to the progress of the CIRP in respect of the Corporate Debtor to this Adjudicating Authority from time to time.
- xvi.** The order of moratorium shall cease to have effect as per Section 14(4) of the I&B Code.
- 13.** Certified copies of this order, if applied for with the Registry of this Adjudicating Authority, be supplied to the parties upon compliance with all requisite formalities.

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- 14.** Post the Company Petition on **16/07/2024** for hearing the Periodical Progress Report by the IRP/RP as appointed herein.

D. Arvind
Member (Technical)

Bidisha Banerjee
Member (Judicial)

Signed this, on the 01st day of May, 2024.

Skb