

In the National Company Law Tribunal,
Kolkata Bench, Kolkata

CP (IB) No.349/KB/2017

In the matter of:

Ramswarup Industries Ltd.Corporate Applicant/ Corporate Debtor

-Versus-

ICICI Bank Ltd.Applicant Bank/Financial Creditor

Order Delivered on 8th Jan 2018

Coram:

V. P. Singh, Member (J)

Jinan K.R., Member (J)

For the Corporate Debtor

- : 1. Mr Jishnu Chowdhury, Advocate
2. Mr. Rishav Banerjee, Advocate
3. Mr. Sidhartha Sharma, Advocate
4. Ms. Namtra Basu, Advocate
5. Mr. Ratul Das, Advocate

For the Respondent

- : 1. Ms. Aparajita Rao, Advocate
2. Ms Sudeshna Sen, Advocate
3. Ms Pallabi Ganguly, Advocate

For the Financial Institute

- : 4. Mr Saubhik Chowdhury, Advocate
5. Mr Dripto Majumdar, Advocate
6. Ms Prapa Ganguly, Advocate
7. Ms Adreeka Pandey, Advocate
8. Ms Satarup Banerjee, Advocate
9. Mr Shaunak Mitra, Advocate
10. Ms Vaibhavi Pandey, Advocate
11. Mr Kuldip Mallik, Advocate
12. Mr D. Mollah, Advocate
13. Mr Debasish Chakraborty, Advocate

ORDER

This application is filed by the corporate applicant for initiating Corporate Insolvency Resolution Process under Sec.10 of the Insolvency & Bankruptcy Code, 2016 (from now on referred to I & B Code, 2016) read with Rule 7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Corporate applicant is Ramswarup Industries Ltd. whose identification No. is L65993WB1979PLC032113 and Shri Ashish Jhunjunwala, Managing Director has filed this application on behalf of the corporate applicant on the basis of board resolution dated 18/5/2017 whereby Shri Ashish Jhunjunwala, Managing Director of the company, has been authorized to file necessary application under the provisions of Insolvency and Bankruptcy Code, 2016. A copy of the Board Resolution dated 18/5/2017 is annexed with the application as Annexure 5.

2. Corporate applicant has also proposed the name of Nilesh Sharma as Interim Resolution Professional nilesh.sharma@irrip.com and also given his details at Part II page 5 of the application.

3. Corporate applicant has filed this application by default in payment to financial creditors, and relevant details of financial creditor whereby default has occurred have been annexed in Annexure 6, page 137A to 137O which shows the total amount of default Rs.3,379.77 crore and outstanding amount is Rs.2,047.70 crore. The chart shows that this default committed on account of loan taken by the corporate applicant from different banks. The details of corporate facilities from different financial creditors are also given from Annexure 7 to 35, pages 138 to 166 of the application. The petitioner has also annexed the document evidencing the existence of debt such as sanction/renewal letter/loan agreement which is Annexure 37 to 64 pages 248 to 393. The petitioner has also annexed a copy of notice along with the correspondence with various assets reconstruction companies; details are annexed as Annexure 37C to 40C, 42C, 43C, 49C, 50C, 52C, 53C, 54C and 66.

4. The petitioner has also annexed the documents evidencing default in payment to the financial creditor which are Annexure 37A, 38A, 39A, 40A, 41A, 42A, 43A, 44A, 45A, 46a, 47A, 48A, 49A, 50A, 51A, 52A, 53A, 54A, 55A, 56A, 57A, 58A, 59A, 60A, 61A, 62A, 63A, 64A, 65A, 50D, 67, 69, 70 and 71.

5. The petitioner has also annexed a copy of ledger account of the financial creditor in the books of the corporate debtor. These are annexed as Annexure 37B, 38B, 40B, 41B, 42B, 43B, 45B, 46B, 47B, 48B, 52B, 54B, 56B, 60B, 62B, 63B, 64B and 65B.

6. It is further stated in the application that Shri Nilesh Sharma, proposed IRP is fully qualified and permitted to act as an IRP. The petitioner has further stated that as per government notification Sec.4(b) of Sick Industrial Companies (Special Provisions) Repeal Act, 2003 as amended by Sec.252 read with Eighth Schedule of Insolvency and Bankruptcy Code, 2016 a company in respect of which any appeal or reference or inquiry pending before AAIFR or BIFR was abated, may make reference to the NCLT under the I & B Code, 2016 within 180 days from commencement of I & B Code, without fees in accordance with the provisions of I & B Code. A copy of the last BIFR order dated 24/11/2016 is enclosed as Annexure 71 and this petition has been filed on 25/5/2017.

7. ICICI Bank Ltd. as the financial creditor has filed the objection against the application alleging that the applicant has filed this application under Sec.10 of the I & B Code to initiate corporate insolvency process fraudulently and with malicious intent for the purposes other than for the resolution of insolvency. ICICI Bank has further submitted corporate applicant including its promoters have initiated the instant proceedings with an intention to thwart the various lenders including the applicant bank from realising their securities with the sole motive of obtaining a moratorium and displacing all their assets including their secured assets from the clutches of law.

8. It has been further alleged that the conduct of the corporate applicant and its directors is indicative of a mala fide intent and the corporate applicant should not be permitted to take advantage of the protective realms offered by the Code in order to abuse the process of law and to stop bona fide recovery actions which after significant effort, time and expense have culminated to advanced stages. The said application is liable to be rejected.

9. ICICI Bank has also alleged that on account of continued financial stress, the corporate applicant referred to Corporate Debt Restructuring (CDR) in November 2010 which was subsequently admitted in December 2010. Under the same, the applicant bank approved a bilateral Debt Restructuring thereby restructuring of the existing credit facilities were made by Debt Restructuring Agreement dated 2/2/2011. The final proposal for restructuring by the

corporate applicant was rejected by CDR EG in December 2011. It has been further reported that total outstanding amount of the ICICI Bank on the corporate applicant is Rs.36.03 crore and ICICI Bank has the first charge over the movable and immovable fixed assets of the corporate applicant situated at Shyam Nagar about Ramswarup Utpadak Division. Details of security pledged in favour of ICICI Bank are given in the objection.

10. It is also alleged that the bank has demanded payment Rs.31.2 crore from the corporate applicant on 27/1/2013, but the corporate applicant failed to pay the dues payable by it to the applicant bank. Therefore, vide notice dated 26/2/2013 the Bank invoked the personal guarantee furnished by Ashish Jhunjunwala in favour of ICICI Bank. On account of such invocation and development of the bank above guarantee, the applicant bank in furtherance to its recall notice dated 28/1/2013, further demanded repayment of all dues payable by the corporate applicant to the applicant bank including the bank above guarantee to vide notice dated 15/1/2014.

11. It is also stated in the objection that the applicant bank has taken all possible steps available to it under law including steps under the SARFAESI Act and Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

12. It has been further alleged by ICICI Bank that the default is a creation and result of fraud and siphoning off funds. The corporate applicant is not a going concern and hence effectively no resolution plan under the Code can be arrived at. Further, the corporate applicant has made no effort to repay its outstanding amount or to honor its commitments even after the restructuring of facilities by the applicant bank. The corporate applicant has been declared as a non-performing asset by various nationalized and private banks including the applicant bank. The corporate applicant and its directors are facing a criminal investigation on account of allegations relating to cheating and defrauding. The conduct of the directors of the corporate applicant does not show that they intend to repay the debts of the bank. On the above basis, ICICI Bank has submitted that the application moved by the corporate applicant be rejected

13. Heard Ld. Counsel for the parties and perused the record. On perusal of the record it appears that as per Government Notification dated 28/5/2016 whereby Sick Industrial Companies [SICA] (Special Provision) Repeal Act, 2003 as amended by Sec.252 read with 8th Schedule of the Insolvency and Bankruptcy Code 2016, a company in respect of which any appeal or reference

or enquiry pending before BIFR or AAIFR was authorized by the Sick Industrial Companies(Special Provision)Repeal Act that such company may make a reference to the NCLT under the I & B Code 2016 in accordance with the provisions of the I & B Code.

The **Sick Industrial Companies (Special Provisions) Repeal Act, 2003** by Government Notification came into effect from 1st Dec 2016. The Notification is given below for ready reference. This application U/S 10 has been filed within the statutory limit of 180 days as provided under The Sick Industrial Companies (Special Provisions) Repeal Act. By S.O. No 3594 (E) I B Code 2016 came into effect from 1st Dec 2016.

“S.O. 3568(E). — In exercise of powers conferred by sub-section (2) of section 1 of the Sick Industrial Companies (Special Provisions) Repeal Act, 2003 (1 of 2004), the Central Government hereby appoints the 1st day of December, 2016, as the date on which the provisions of the said Act shall come into force.”

14. As per provision of The Sick Industrial Companies (Special Provisions) Repeal Act, 2003 any company whose reference was pending before SICA was authorized to file reference to the NCLT under I & B Code, 2016. Relevant provision of the Act, for ready reference, is given below:-

THE EIGHTH SCHEDULE

Amendment to the Sick Industrial Companies (Special Provisions) Repeal Act, 2003 (1 of 2004)

In Section 4, for sub-clause (b), the following sub-clause shall be substituted, namely—

"(b) On such date as may be notified by the Central Government in this behalf, any appeal preferred to the Appellate Authority or any reference made or inquiry pending to or before the Board or any proceeding of whatever nature pending before the Appellate Authority or the Board under the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) shall stand abated:

Provided that a company in respect of which such appeal or reference or inquiry stands abated under this clause may make reference to the National Company Law Tribunal under the Insolvency and Bankruptcy Code, 2016 within one hundred and eighty days from the commencement of the Insolvency and

Bankruptcy Code, 2016 in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016:

Provided further that no fees shall be payable for making such reference under Insolvency and Bankruptcy Code, 2016 by a company whose appeal or reference or inquiry stands abated under this clause."

15. Applicant has filed the reference under sub-rule (1) of rule 7 of Adjudicating Authority Rules 2016 and application have been submitted in Form 6 as prescribed in Adjudicating Authority Rules 2016. Relevant provision of the rule, for ready reference, is given below:-

Rule 7. Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

7. Application by corporate applicant.— (1) A corporate applicant shall make an application for initiating the corporate insolvency resolution process against a corporate debtor under section 10 of the Code in Form 6, accompanied with documents and records required therein and as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

(2) The applicant under sub-rule (1) shall dispatch forthwith, a copy of the application filed with the Adjudicating Authority, by registered post or speed post to the registered office of the corporate debtor.

16. On perusal of the above rule, it is clear that corporate applicant may make an application for initiating corporate insolvency process against the corporate debtor under Sec.10 of the I & B Code 2016 in Form 6 accompanied with documents and records required therein.

17. It is important to mention that Rule 7 of the Adjudicating Authority Rules, 2016 is applicable for that corporate applicant who wants to initiate corporate insolvency process against a corporate debtor. It is pertinent to mention that corporate applicant is defined in Sec.5 sub-rule (5) of I & B Code, 2016 which is given below for ready reference:-

Sec 5 (5) Insolvency and Bankruptcy Code 2016

"corporate applicant" means—

(a) corporate debtor; or

(b) a member or partner of the corporate debtor who is authorized to make an application for the corporate insolvency resolution process under the constitutional document of the corporate debtor; or

(c) an individual who is in charge of managing the operations and resources of the corporate debtor; or

(d) a person who has the control and supervision over the financial affairs of the corporate debtor;

On perusal of the definition of corporate applicant provided in Sec 5(5) of I&B Code, it appears that corporate applicant may be corporate debtor or a partner of the corporate debtor who is authorized to make an application for the corporate Debtor for initiation of corporate insolvency resolution process

Ld. Counsel for the Corporate Applicant in the course of hearing has relied on the principles of law laid down by the Hon'ble NCLAT in case of Leo Duct Engineers & Consultants Ltd. vs Canara Bank ,Company Appeal 100/2017.

In the above-mentioned case, Hon'ble NCLAT has held that :

"21. In an application under section 10, the Financial Creditor or the Operational Creditor may dispute that there is no default or that the debt is not due and is not payable by law or fact. They may also oppose admission on the ground that Corporate Applicant is not eligible to make application given ineligibility under section 11 of the I.B. Code. The Adjudicating Authority on hearing the parties and on perusal of record, if satisfied that there is a debt and default has occurred, and the Corporate Applicant is not ineligible under section 11, the Adjudicating Authority has no option but to admit the application, unless it is incomplete, in which case the Corporate Applicant is to be granted time to rectify the defects.

22. Section 10 does not empower the Adjudicating Authority to go beyond the records as prescribed under section 10 and the information as required to be submitted in Form VI of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules 2016 subject to ineligibility prescribed under section 11. If all information is provided by an applicant as required under

section 10 and Form VI and if the Corporate Applicant is otherwise not ineligible under section 11, the Adjudicating Authority is bound to admit the application and cannot reject the application on any other ground.

23. Any fact unrelated or beyond the requirement under IB Code or forms prescribed under Adjudicating Authority Rules (Form VI in the present case) are not required to be stated or pleaded. Non-disclosure of any facts, unrelated to section 10 and Form-VI cannot be termed to be suppression of facts or to hold that the Corporate Applicant has not come with clean hand except the application where the Corporate Applicant has not disclosed disqualification if any under section 11..”

18. It is also clear that for initiation of corporate insolvency resolution process by corporate applicant U/S 10 following requirements are necessary to be fulfilled.

1) Where a corporate debtor has committed a default, a corporate applicant thereof may apply to initiating corporate insolvency resolution process with the Adjudicating Authority.

(2) The application under sub-section (1) shall be filed in such form, containing such particulars and in such manner and accompanied by such fee as may be prescribed.

(3) The corporate applicant shall, along with the application furnish the information relating to—

(a) its books of account and such other documents relating to such period as may be specified; and

(b) the resolution professional proposed to be appointed as an interim resolution professional.

(4) The Adjudicating Authority shall, within fourteen days of the receipt of the application, by an order—

(a) admit the application, if it is complete; or

(b) reject the application, if it is incomplete:

Provided that Adjudicating Authority shall, before rejecting an application, give a notice to the applicant to rectify the defects in his application within seven days from the date of receipt of such notice from the Adjudicating Authority.

(5) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (4) of this section.

19. In the case in hand, the application has been moved by corporate applicant under Sec.10 of the I & B Code 2016 and as per the details given in the application and on the basis of documents submitted in support of that, it reveals that corporate debtor has debt liability of about Rs.3,379.77 crore and has failed to make payment to the financial and operational creditors. The corporate debtor has given a chart which shows the amount of default is Rs.3,379.77 crore of about 41 banks, and details of all the lenders are given in Annexure 6 from pages 137A to 137O.

20. It is also important to mention that ICICI Bank who happens to be one of the creditors has filed an objection and has stated in the objection that corporate applicant has filed this application with fraudulent intent of exploiting the moratorium provisions under the I & B Code and application has been filed with mala fide intent and ICICI Bank made a request that corporate applicant should not be permitted to take advantage of the protective realms offered by the Code in order to abuse the process of law and to stop bona fide recovery actions which, after significant effort, time and expense, have culminated to advance stage. It is also mentioned in the objection that corporate applicant referred to Corporate Debt Restructuring (CDR) in November 2010. Finally, the proposal for restructuring by the corporate applicant was rejected by CDR EG in December 2011.

21. ICICI Bank has stated in the objection that to affecting recovery of the substantial sum of money advanced to the corporate applicant and owned to the applicant bank, which has taken all possible steps available to it under the law including SARFAESI Act, 2002 and RDDBFI Act, 1993. It is also stated in the objection, that corporate applicant had filed a reference before BIFR in November 2012 on the ground that more than 75% of secured creditors had already taken possession of the secured immovable properties under the provisions of SARFAESI Act. The said reference was dismissed by BIFR vide order dated 19/2/2014. A corporate applicant aggrieved by such order preferred an appeal before the AAIFR to further stall the ongoing proceedings

initiated by the secured financial creditors. It is also mentioned in the objection that Appellate Authority remanded the case back to BIFR vide order dated 3/12/2014 with a specific direction to consider the submission of all the parties and pass an order afresh after giving specific findings through a reasoned order.

22. Above mentioned reference was pending before BIFR which was abated on account of coming into effect of SICA Repealing Act and by virtue of that corporate applicant, i.e. Corporate Debtor was given authority to file reference within 180 days before NCLT under I & B Code and in compliance with that the applicant has filed this petition under Sec.10 of the I & B Code.

23. It is pertinent to mention that there are more than 41 banking and financial institutions whose outstanding dues, as per statement, is about Rs.3,379.77 crore and the argument has been advanced on behalf of corporate applicant that ICICI Bank has exposure of Rs.36.03 crore, which happens to be approximately less than 0.93% of the total outstanding amount. Therefore, the objection of ICICI Bank should not be taken into consideration and application under section 10 should be admitted.

24. In the case in hand, the applicant has filed this application under Sec.10 of the I & B Code is in nature of reference which was pending before BIFR and abated on account of coming into effect of SICA Repealing Act. The learned counsel of the corporate applicant has relied upon the law laid down by the Hon'ble NCLAT in the case of Leo Duct Engineers & Consultants Ltd. -vs- Canara Bank Company Appeal 100/2017. In this case, Hon'ble NCLAT has held that **Section 10 does not empower the Adjudicating Authority to go beyond the records as prescribed under section 10** and the information as required to be submitted in Form VI of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules 2016 **subject to ineligibility prescribed under section 11**. If all information is provided by an applicant as required under section 10 and Form VI and if the Corporate Applicant is otherwise not ineligible under section 11, the Adjudicating Authority is bound to admit the application and cannot reject the application on any other ground.

25. As per Sec.11 of the I & B Code deals with the persons not entitled to make application.— The following persons shall not be entitled to make an application to initiate corporate insolvency resolution process under this Chapter, namely—

- (a) a corporate debtor undergoing a corporate insolvency resolution process; or
- (b) a corporate debtor having completed corporate insolvency resolution process twelve months preceding the date of making of the application; or
- (c) a corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application under this Chapter; or
- (d) a corporate debtor in respect of whom a liquidation order has been made.

Explanation.— For this section, a corporate debtor includes a corporate applicant in respect of such corporate debtor.

26. It is undisputed that corporate debtor is not ineligible U/S 11 of the I B Code to file application U/S 10 of the Code. The financial creditors have filed separate application U/S 7 of the code for initiation of corporate insolvency process against the same corporate debtor but after filing of the application by the corporate debtor under Sec.10 of the I & B Code, when notices were issued against the financial creditors. The application filed by the corporate applicant U/S 10 of I B Code, has been submitted earlier to those applications which have been filed subsequently U/S 7 by Financial creditors when notices were issued against them. Every ingredient of Sec 10 is complete, and all the information is provided by an applicant as required under section 10 in Form VI. The Corporate Applicant is otherwise not ineligible under section 11. Thus application filed U/S 10 deserves to be admitted.

ORDER

The petition filed by the corporate applicant under Sec.10 of the Insolvency & Bankruptcy Code, 2016 is hereby admitted for initiating the Corporate Resolution Process against the corporate debtor. We pass an order for a declaration of the moratorium and public announcement U/S Sec.13 of the IBC, 2016.

The moratorium is declared for the purposes referred to in Sec.14 of the Insolvency & Bankruptcy Code, 2016. The IRP shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Sec.15. The public announcement

referred to in clause (b) of sub-section (1) of Insolvency & Bankruptcy Code, 2016 shall be made immediately.

Moratorium under Sec.14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:

- 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 (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.

The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during the moratorium period.

The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

The order of moratorium shall affect the date of such order till the completion of the corporate insolvency resolution process.

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Sec.31 or passes an order for liquidation of corporate debtor under Sec.33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

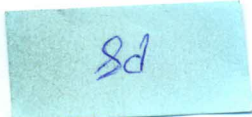
Necessary public announcement as per Sec.15 of the IBC, 2016 may be made.

Mr Nilesh Sharma as Interim Resolution Professional email address nilesh.sharma@irrip.com and also given his details at Part II page 5 of the application is appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a meeting of Committee of Creditors for evolving a resolution plan.

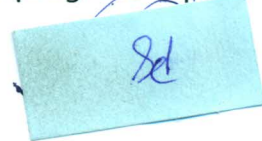
The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors.

Let the certified copy of the order be issued upon compliance with requisite formalities and a copy of the order may also be sent to the Applicant/Financial Creditor as well as Corporate Debtor and IRP through email.

List the matter on 31st January 2018 for filing of the progress report.



**Jinan K.R.,
Member(J)**



**V. P. Singh,
Member (J)**

Signed on 8th January 2018