

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

C.P (IB) No. 1847/KB/2019

A Petition under section 7 of the Insolvency and Bankruptcy Code, 2016 read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

In the matter of:

IDBI Bank

...Financial Creditor

Versus

D P Dutta Agro Mills Private Limited (CIN U15143WB1992PTC055481), a Company incorporated under the Companies Act, 1956 having its registered office at Alamganj, (Near S.B.S.T.C. Garrage) P.O.: -Nutangan P.S. &Dist:- Burdwan Alamganj WB 713102 IN.

...Corporate Debtor

Date of Hearing: 20.07.2022

Date of pronouncing the order: 26.08.2022

Coram:

Shri Rohit Kapoor

: Member (Judicial)

Shri Balraj Joshi

: Member (Technical)

Appearances (through Video Conferencing/ physical hearing)

- | | |
|-----------------------------------|--------------------------|
| 1. Mr. Shaunak Mitra Advocate | } For Financial Creditor |
| 2. Mr. Siddhant Makkar, Advocate | } |
| 1. Mr. Nimish Mishra, Advocate | } For Corporate Debtor |
| 2. Mr. Debjit Mukherjee, Advocate | } |

ORDER

Per Balraj Joshi, Member (Technical)

1. The Court convened *via* hybrid mode.
2. This is a Company Petition filed under section 7 of the Insolvency and Bankruptcy Code, 2016 (*'the Code'*) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by IDBI Bank (*'Financial Creditor'*), by Ms. Minky Pramanik, Deputy General Manager, duly authorised through Authorization Letter dated 14 August, 2019 for initiation of Corporate Insolvency Resolution Process (*'CIRP'*) against D P Dutta Agro Mills Private Limited (*'Corporate Debtor'*).
3. The present Petition was filed on 01 November, 2019 before this Adjudicating Authority on the ground that the Financial Creditor had advanced several cash and credit facilities (*'Credit facility' or 'Loan'*) to the Corporate Debtor.
4. The total amount claimed in default by the Financial Creditor is Rs. 31,57,17,939.56 (Rupees Thirty One Crore Fifty Seven Lakh Seventeen Thousand Nine Hundred Thirty Nine and Fifty Six Paise only) including interest @ 10.75%.
5. It is submitted in the Petition, Part – II that the authorised share capital of the Corporate Debtor is Rs. 1,10,00,000/- (Rupees One Crore Ten Lakh only) with paid up Capital as Rs. 10,00,000/- (Rupees Ten Lakh only).

Submissions by the Ld. Counsel appearing on behalf of the Financial Creditor

6. The Financial Creditor had granted several credit and cash facilities to the Corporate Debtor and the Corporate Debtor defaulted in repayment of such facilities. The Cash Credit limit sanctioned by the Financial Creditor was of Rs. 5,00,00,000/- and later on enhanced to Rs. 7,50,00,000/-

7. The total debt for the accounts- '259102000001663', '259655100000019' and '7508778000000277' is Rupees 31,57,17,939.56/- (Rupees Thirty One Crore Fifty Seven Lakh Seventeen Thousand Nine Hundred Thirty Nine and Fifty Six Paise only) as on 01/08/2019, being maintained in the name of the Corporate Debtor with the Financial Creditor. The accounts of the Corporate Debtor were declared NPA by the Financial Creditor Bank on 28 September, 2011.
8. Further, the Financial Creditor on 26 February, 2013 issued a loan recall notice to the Corporate Debtor. Thereafter, the Financial Creditor issued notice dated 17 August, 2013 invoking Personal Guarantee of the Directors of the Corporate Debtor, namely Shri Ramdas Dutta, Shri Debdas Dutta and Shri Biprodas Dutta.
9. Pursuant to the same, the Financial Creditor issued letter dated 17 August, 2013 to the Corporate Debtor regarding redemption of Mortgage for the default committed by the the Corporate Debtor for the accounts maintained with the Financial Creditor Bank. The Financial Creditor further took recourse under the SARFAESI Act, 2002 and issued notice dated 10 October, 2013 u/s 13(2) of the said Act for the accounts in the name of the Corporate Debtor maintained with the Financial Creditor Bank.
10. Subsequently, the Financial Creditor Bank issued notice dated 01 January, 2014 u/s 13(4) of the SARFAESI Act, 2002 to the Corporate Debtor through its Directors for the default committed by the company viz. Dutta Agro Mills Pvt. Ltd.
11. In order to find an alternative solution to the issue, the Financial Creditor Bank in concurrence with the Corporate Debtor offered an OTS (One Time Settlement) offer vide letter dated 01 November, 2018 under SARAL KARJ BHUGTAN YOJNA to the Corporate Debtor. The Corporate Debtor accepted the offer for OTS vide its letter dated 28 December, 2018.
12. From time to time the said OTS settlement was extended, however, the Corporate Debtor failed to adhere to the OTS under the SARAL KARJ BHUGTAN YOJNA.

Hence, at last the Financial Creditor cancelled the OTS proposal on 01 August, 2019.

Submissions by the Ld. Counsel appearing on behalf of the Corporate Debtor

13. As alleged by the Financial Creditor, the account of the Corporate Debtor was classified as NPA on 28 September, 2011 but there is no allegation of default in the application anywhere. Subsequently, by way of a supplementary affidavit, the Financial Creditor has alleged the default occurred as on 30 June, 2011. Further, the application is barred by limitation because the Financial Creditor has issued the loan recall notice on 26 February, 2013 and has filed this application in the year 2019.
14. It is pertinent to mention that the default could not have taken place on 30 June, 2011 because as per the sanction letter dated 31 March, 2011 the loan account would be due for repayment before 07 March, 2012. There is no evidence to substantiate that the default was on 30 June, 2011.
15. For a statement of Accounts to be admissible before the Court, it has to be in accordance with the Bankers Book of Evidence Act, 1891. But the Financial Creditor has failed to establish that the statements of accounts are in accordance with the Bankers Book of Evidence Act.
16. Reliance has been placed on *Sampuran Singh v. Niranjana Kaur* (AIR 1999 SC 1047), *Vashdeo R. Bhojwani v. Abhyudaya Co-operative Bank Limited &Anr.* ((2019) 9 SCC 158) and *Gaurav Hargovindhbhai Dave v. Asset Reconstruction Company (India Limited) &Anr* ((2019) 10 SCC 572)
17. Further, the contention of the financial creditor that the debt has been acknowledged in the balance sheet by the auditor it is stated that the Auditor is a

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third party and does not have and authority to decide or to adjudicate an issue on 'default'. It is for this Adjudicating Authority to adjudicate on default.

18. Supplementary affidavit has been filed. In part 15 to 21 it has been stated;-

- i. There was OTS scheme which was accepted by the Corporate Debtor on 28 of December, 2018.
- ii. Further to this detailed OTS offer was issued to the applicant on 11 of January, 2019 and it was accepted by the CD on 21 of January, 2019. A Copy of which is enclosed as Annexure- E.

Statement showing the series of events for the accounts of the Corporate Debtor maintained with the Applicant Bank is reproduced hereinafter;

<i>SI. No.</i>	<i>Particulars</i>	<i>Date</i>
1	Date of Default	31/08/2013
2	Date of NPA	31/03/2013
3	Date of representation u/s 13(3) of SARFAESI Act, 2002	21/11/2014
4	Payment received from the Corporate Debtor	29/03/2017
5	Payment received from the Corporate Debtor under OTS Offer SKBY	31/12/2018
6	Further payment received from the Corporate Debtor	22/01/2019
7	Further payment received from the Corporate Debtor	06/03/2019
8	Limitation period ending on	06/03/2022

Analysis and Findings.

19. We have heard the Ld. Counsel appearing on behalf of the Financial Creditor and the Ld. Counsel appearing on behalf of the Corporate Debtor. The principal issue that arises before us is ***'whether the Petition under section 7 of the Code is barred by limitation or not?'***

20. Upon perusal of the record it is apparent that transaction between the parties was purely financial in nature and there is an existence of Financial Debt. From the above records it is apparent that from time to time the Financial Coeditor under SARAL KARJ BHUGTAN YOJNA extended One Time Settlement offer to the Corporate Debtor and the OTS was accepted by the Corporate Debtor *[at page 233 of the Company Petition]*.
21. Balance sheet for year ending as on 2014 - 2015, 2015 – 2016, 2016 – 2017 & 2017 - 2018 of the Corporate debtor reflects that Corporate Debtor has certain short term borrowings which is showing that there exists cash credit facilities from the Bank. Further the Balance sheet also reflects secured term loans (Long term borrowings). Thus it is evident that the Corporate Debtor is still acknowledging the debt due to the financial creditor being the Financial Creditor in the instant case.
22. Further, as per the Auditors' Report of the Corporate Debtor for financial year ending as on 2014 – 2015 (*page 61 of the Supplementary Affidavit*), 2015 – 2016 (*page 80 of the Supplementary Affidavit*), 2016 – 2017 (*page 101 of the Supplementary Affidavit*) & 2017 – 2018 (*page 125 of the Supplementary Affidavit*), it states that the Corporate Debtor has defaulted in the repayment of loans or borrowings to financial institutions, banks.
23. In ***Laxmi Pat Surana V. Union Bank of India & Anr, decided*** on March 21, 2021, the Hon'ble Supreme Court has held that.

"37. Ordinarily, upon declaration of the loan account/debt as NPA that date can be reckoned as the date of default to enable the financial creditor to initiate action under Section 7 of the Code. However, Section 7 comes into play when the corporate debtor commits "default". Section 7, consciously uses the expression "default" not the date of notifying the loan account of the corporate person as

NPA. Further, the expression "default" has been defined in Section 3(12) to mean non-payment of "debt" when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be. In cases where the corporate person had offered guarantee in respect of loan transaction, the right of the financial creditor to initiate action against such entity being a corporate debtor (corporate guarantor would get triggered the moment the principal borrower commits default due to non-payment of debt. Thus, when the principal borrower and/or the (corporate) guarantor admit and acknowledge their liability after declaration of PA but before the expiration of three years there from including the fresh period of limitation due to (successive) acknowledgments, it is not possible to extricate them from the renewed limitation accruing due to the effect of Section 18 of the Limitation Act. **Section 18 of the Limitation Act gets attracted the moment acknowledgment in writing signed by the party against whom such right to initiate resolution process under Section 7 of the Code enures. Section 18 of the Limitation Act would come into play every time when the principal borrower and/or the corporate guarantor (corporate debtor), as the case may be, acknowledge their liability to pay the debt. Such acknowledgment, however, must be before the expiration of the prescribed period of limitation including the fresh period of limitation due to acknowledgment of the debt, from time to time, for institution of the proceedings under Section 7 of the Code.** Further, the acknowledgment must be of a liability in respect of which the financial creditor can initiate action under section 7 of the Code."

24. In *Rajendra Narottamdas Sheth and Another v. Chandra Prakash Jain and Another*¹, the Hon'ble Supreme Court

¹ 2021 SCC OnLine SC 843

“ 23. It is no more res integra that Section 18 of the Limitation Act is applicable to applications filed under Section 7 of the Code. In case the application under Section 7 is filed beyond the period of three years from the date of default and *the financial creditor furnishes the required information relating to the acknowledgement of debt, in writing by the corporate debtor, before the Adjudicating Authority, with such acknowledgement having taken place within the initial period of three years from the date of default, a fresh period of limitation commences* and the application can be entertained, if filed within this extended period.”

25. In light of the above facts and circumstances there has been continuous acknowledgement in the Balance Sheet of the Corporate Debtor for the Financial Balance sheet for year ending 2011, 2012, 2013 & 2018 of the Corporate Debtor, which would extend the limitation period from time to time.
26. Further, it is seen from the record that the date of default has been mentioned as 30 June, 2011, which stood revived with the acceptance of the OTS proposal by the Corporate Debtor on 28 December, 2018. Moreover, upon perusal of the records *at page 231 and 232 of the Petition*, it is apparent that the Corporate Debtor also made part payment of the OTS proposed amount. Further, the settlement proposal under the SARAL KARJ BHUGTAN YOJNA provided for the payment of the balance amount within 31 March, 2019.
27. In light of the above facts and circumstances, the present petition filed by the Financial Creditor is complete in all respects as required by law. The Petition establishes that the Corporate Debtor is in default of a debt due and payable and that the default is more than the minimum amount stipulated under section 4 (1) of the Code, stipulated at the relevant point of time.
28. Accordingly, it is, hereby ordered as follows:-

- (a) The application bearing **CP (IB) No. 1847/KB/2019** filed by IDBI Bank, the Financial Creditor, under section 7 of the Code read with rule 4(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against DP Dutta Agro Mills Private Limited, the Corporate Debtor, is ***admitted***.
- (b) There shall be a moratorium under section 14 of the Insolvency & Bankruptcy Code, 2016, and moratorium prohibits the following:
- i. 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;
 - ii. Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;
 - iii. 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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
 - iv. The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.
- (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) **Mr. Pankaj Kumar Tibrewal**, registration number **IBBI/IPA-001/IP-P-01577/2018-2019/12410**, email: **tibrewalpankaj@yahoo.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 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. 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 Financial Creditor shall deposit a sum of **Rs.5,00,000/- (Rupees Five Lakh 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 Financial Creditor 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.
29. **CP (IB) No. 1847/KB/2019** to come up on **31.10.2022** for filing the periodical report
30. 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)

The Order is pronounced on 26th August, 2022

S, LRA