THE NATIONAL COMPANY LAW TRIBUNAL
PRINCIPAL BENCH
AT NEW DELHI

Company Petition No. (IB)-409 (PB)/2017

Under Section 7 of the Insolvency and Bankruptcy Code, 2016

In the matter of:

Edelweiss Asset Reconstruction Co. Ltd.

Applicant/Financial Creditor

Vs

Net 4 India Limited

Respondent / Corporate Debtor

Judgment delivered on: --08.**03.2019**

CORAM:

MR. CHIEF JUSTICE (RTD.) M. M. KUMAR HON'BLE PRESIDENT

MR. S. K. MOHAPATRA, MEMBER (TECHNICAL)

For Petitioner: Mr. Sanjay Bhatt, Advocate.
For Respondent: Mr. Gaurav Malik, Mr. Gurkamal Hora Arora & Mr. Arjun Sehgal, Advocates.

ORDER

S. K. Mohapatra, Member

1. M/s Edelweiss Asset Reconstruction Limited, claiming as the financial creditor, has filed the instant application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with a prayer to trigger Corporate Insolvency Resolution Process in respect of respondent Company M/s. Net 4 India Limited, referred to as the corporate debtor.

2. The Respondent Company M/s. Net 4 India Limited (CIN No. L72200 DL1985 PLC 022649) against whom initiation of Corporate Insolvency Resolution Process has been prayed for, was incorporated on 29.11.1985 and presently has its registered office Plot No. 139-A-1, S/F Mohammadpur, New Delhi-110061. Since the registered office of the respondent corporate debtor is in

New Delhi, this Tribunal having territorial jurisdiction over the NCT of Delhi is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor under sub-section (1) of Section 60 of the Code.

3. It is appropriate to mention that Mr. Sagar Seth, Authorised Signatory of the applicant company duly authorized by Board Resolution dated 17.08.2017 has preferred the present application on behalf of the applicant, M/s. Edelweiss Asset Reconstruction Company Limited, for initiation of Corporate Insolvency Resolution Process against the respondent corporate debtor in terms of the provisions of the Code. A copy of the relevant Board Resolution of the applicant company held on 17.08.2017 has been placed on record.

4. The applicant has proposed the name of Mr. Vikram Bajaj, for appointment as Interim Resolution Professional having registration number IBBI / IPA - 002 / IP-N00003 / 2016-17 / 10003 resident of Flat No.

12, Vasudha Apartment, Plot – 41, Sector – 9 Rohini, Delhi – 110085 with email-id bajaj.vikram@gmail.com. Mr. Vikram Bajaj has enclosed the copy of certificate of registration dated 27th January, 2017 issued by IBBI to act as an insolvency professional in accordance with the Insolvency and Bankruptcy Board of India (insolvency professionals) Regulations 2016. Mr. Vikram Bajaj has further agreed to accept appointment as the interim resolution professional and has signed a communication dated 19.09.2017 in Form 2 in terms of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. There is a declaration made by him that no disciplinary proceedings are pending against him in Insolvency and Bankruptcy Board of India or elsewhere. In addition, further necessary disclosures have been made by Mr. Vikram Bajaj as per the requirement of the IBBI Regulations. Accordingly, he satisfies the requirement of Section 7 (3) (b) of the Code.

5. It is the case of the applicant that the Respondent Corporate Debtor had approached State Bank of India seeking financial assistance. At the request of the Corporate Debtor, State Bank of India had sanctioned financial assistance to the respondent company vide sanction letter dated 6th August, 2002.

6. Thereafter on 31.10.2002 the Respondent Corporate Debtor executed the loan and security documents in accordance with the terms of sanction and created security interest in favour of the State Bank of India. Subsequently on 01.04.2003 the respondent Corporate Debtor executed supplemental Loan Agreement for increase in the overall limit.

7. It is also the case of applicant that the respondent Corporate Debtor again approached State Bank of India on various occasion from 09.05.2005 to 10.09.2012 seeking further financial assistance for increase in the overall limit. At the request of the Corporate Debtor, State Bank of India had sanctioned additional financial assistance. Further, loan agreements and supplemental

loan agreements were executed in terms of sanction from time to time.

8. It is alleged that the respondent corporate debtor defaulted in repayment of dues of the State Bank of India and accordingly, the State Bank of India in terms of the RBI guidelines declared the account of the Corporate Debtor as a Non-Performing Asset on 29.09.2013.

9. It is further stated that due to failure on part of the Corporate Debtor to discharge its liabilities, the State Bank of India issued a Demand Notice under Section 13(2) of the SARFAESI Act, 2002 to the Corporate Debtor requesting it to discharge its liabilities in full within 60 days thereof.

10. In the meantime, vide a Deed of Assignment dated 11.08.2014 executed between the State Bank of India and the Applicant, State Bank of India assigned all its right, title, interest and benefit in respect of the debts against the Corporate Debtor Company together with security interest therein to the Applicant.

11. Thereafter in terms of assignment deed dated 11.08.2014 the applicant had filed original application being O.A. No. 241/2015 before Debt Recovery Tribunal-I, New Delhi for recovery of the outstanding debts.

12. It has been stated at Part-IV of Form-1 that as on 31.08.2017 total amount of default is Rs.194, 08, 60, 284/-.

13. The applicant has filed copies of all the relevant loan agreements, guarantee deeds, mortgage deeds, and revival and confirmation letters executed by the respondent company from time to time including the registration as well as modification of charges created in order to secure the loan facilities sanctioned/ enhanced / revised from time to time. The applicant has further enclosed the annual report of the respondent corporate debtor for the financial year 2015-16. Besides copies of accounts duly certified in terms of Section 65B of the Indian Evidence Act have been placed on record. Applicant has also annexed the details of computation

of the default amount along with days of default in support of its claim.

14. It is thus seen that the applicant 'financial creditor' has placed on record voluminous and overwhelming evidence in support of the claim as well as to prove the default.

15. On the ground that huge amounts are outstanding, it is claimed that the respondent corporate debtor has become commercially insolvent and accordingly it is prayed for initiation of corporate insolvency resolution process against the respondent company by admitting the present application.

16. The respondent corporate debtor has filed its reply on 01.12.2017. Rejoinder to the reply was filed by the applicant on 20.12.2017.

17. We have heard the learned counsels for the parties and have perused the case records.

18. The various objections raised by the respondent corporate debtor are discussed below.

19. The respondent has submitted that the present petition is defective and is not in compliance of the requirements of the Code. It is contended that the petitioner has not filed the relevant statement of account duly certified under Banker's Books Evidence Act.

20. In this regard applicant has responded in its rejoinder that the applicant is an Asset Reconstruction Company duly registered with the Reserve Bank of India and is not a bank and therefore the applicant has filed the statement of accounts duly certified in terms of Section 65B of the Indian Evidence Act. It is emphasized that the application is complete and is in full compliance with the requirements of the provisions of the Code.

21. The present application under Section 7 of the Code for initiative Corporate Resolution Insolvency Process has been filed by petitioner financial creditor in Form-1 in terms of Rule 4 of Insolvency and Bankruptcy (application to Adjudicating Authority) Rules, 2016

accompanied with required information, documents and records as prescribed under the Rules. The petitioner has annexed annual report of the corporate debtor, certificate of registration of charge, assignment agreement, various loan and security documents, balance confirmation letters, revival letters and documents in support of creation of mortgage etc. Moreover the application discloses date wise disbursement of loan, particulars of financial debt along with documents and records in support of evidence of default. There appears to be no infirmity in the application form, being complete in all respect.

22. Respondent has raised another objection that an original application numbering 241 of 2015 has been filed for recovery of the financial debt in question against the respondent company in the Debts Recovery Tribunal New Delhi, which is till *sub-judice*. It is further submitted that applicant has already initiated proceedings under Securitization Act against which respondent has filed a securitization application bearing

S.A No. 537 of 2016 which is also *sub-judice* before DRT Lucknow. Accordingly, it is argued that the applicant is indulging in forum shopping and the present application is not maintainable.

23. In this regard it is well settled that pendency of proceedings and initiation of action under SARFAESI Act and under Debts Due to Banks and Financial Institutions Act, 1993 cannot be an impediment or bar to initiate the Corporate Insolvency Process against the corporate debtor under the provisions of Section 7 of the Code. Simply pendency of proceedings cannot be a ground to deny admission of an application under Section 7 of the Code, once the application is complete and there has been commission of default.

24. Insolvency and Bankruptcy Code, 2016 being a complete Code and Union Law, will prevail over other later laws like the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and SARFESI Act, 2002. As per Section 238 of the Code, the provisions of

the Code are to be given effect to notwithstanding anything contrary contained in any other later laws.

25. Section 238 of the Code envisages as follows.

> ***"238. Provisions of this Code to override other laws.***
>
> *The Provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."*

26. Hon'ble NCLAT in the matter of M/s. Ksheeraabd Constructions Pvt. Ltd. *V.* M/s. Vijay Nirman Company Pvt. Ltd. in Company Appeal (AT) (Insolvency) No. 167 of 2017 has observed that:

> *"The "I & B Code" being a complete code will prevail over other Acts.----------No person can take advantage of pendency of a case to stall "Corporate Insolvency Resolution Process" under the I & B Code".*

27. Similarly in the case of M/s Innoventive Industries Ltd. V. ICICI Bank and Ors reported in AIR 2017 SC 4084, Hon'ble Supreme Court has also held at para 56 that:

> *"The non-obstante clause, in the widest terms possible, is contained in Section 238 of the Code, so that any right of the corporate debtor under any other law cannot come in the way of the Code".*

28. In view of the above discussion, the objection in this regard will not sustain as initiation and pendency of proceedings in different forums is no bar for initiation of Corporate Insolvency Resolution Process under Section 7 of the Code in view of the overriding effect given to the provisions of Section 238 of the Code.

29. Respondent has taken another objection that the present application is barred by the Limitation Act. It is stated that the date of default committed by respondent has been shown as 30.06.2013 and the account has

been declared as NPA on 23.09.2013. Accordingly, it is argued that the present application is barred by limitation as the same is not been filed within three years from the date of accrual of cause of action.

30. In the present case there is no dispute that the loan was *inter alia* secured by mortgage of properties the details of which have been mentioned at Part V of the application. Copies of letters of confirmation of mortgage dated 27.08.2010, 09.05.2011, 08.09.2011 and 11.09.2012 have been placed on record. Besides copy of registration of charge issued by Registrar of Companies has also been placed on record.

31. Accordingly, as the loan transaction has been secured by mortgage the limitation period under Article 62 of Limitation Act is 12 (twelve) years. In the present case equitable mortgage was created over immovable property and was offered as collateral security for the loan and therefore the limitation period will be 12 (twelve) years. Accordingly, the objection that the claim is barred by limitation cannot sustain.

32. The respondent company has also challenged the deed of assignment executed by State Bank of India 15.08.2014 in favour of the applicant M/s. Edelweiss Asset Reconstruction Company Limited. It is alleged that deed of assignment has not been registered as per the provisions of Indian Stamp Act and Registration Act. It is also alleged that applicant does not come within the purview of "financial creditor".

33. In this regard applicant has submitted in its rejoinder that the assignment deed has been duly stamped and registered with the registering authority in Noida. It is further submitted that the Assignment Deed is fully legal and valid. That apart under sub-section (7) of Section 5 of the Code "financial creditor" includes a person to whom financial debt has been legally assigned or transferred to. In the present case as the outstanding loan amount has been duly assigned from SBI to the present applicant; the applicant clearly comes within the definition of "financial creditor".

34. The corporate debtor has also alleged that excess interest has been charged by the banks and the amount claimed is incorrect. It is pertinent to mention in this regard that dispute over the quantum of default, cannot be a ground for rejection of an application under Section 7 of Code as the determination of quantum of financial debt is not within the domain of the Adjudicating Authority. In the present proceeding the Tribunal is not supposed to ascertain the quantum of amount of default or to pass a decree as to how much is actually due to the applicant financial creditor. The Code requires the adjudicating authority to only ascertain and record satisfaction in a summary adjudication as to the occurrence of default before admitting the application.

35. Needless to say, that an application under Section 7 of the Code is acceptable so long as the debt is proved to be due and there has been occurrence or existence of default. What is material is that the default is for at least Rs.1 Lakh. In view of Section 4 of the Code, the

moment default is of Rupees one lakh or more, the application to trigger Corporate Insolvency Resolution Process under the Code is maintainable. The corporate debtor has failed to show that there is no debt or default in existence so as to avoid the provisions of the Code.

36. As regards allegation of excessive charging of interest, applicant has stated in its rejoinder that the interest has been charged in accordance with the terms of sanction letter from time to time. Be that as it may the corporate debtor would be entitled to raise objection of mismatching of dues and excess charging of interest before the resolution professional/ committee of creditors. Adjudicating Authority is only to ascertain the existence of a default and not to adjudicate and crystalize the claim as to how much is actually due and payable. Mere mismatch of the figures and dispute over quantum of default will ipso facto not estop the admission of corporate insolvency resolution process under Section 7 of the Code.

37. Respondent has further alleged that the applicant bank being in a dominant position got certain sets of unfilled papers, undated printed proformas, blank stamp papers and forms etc.; signed from the signatory of the respondent company. It is further alleged that SBI had not disbursed the loan amount on time as per the terms of the loan agreement causing loss to the respondent company. In this regard applicant has submitted in its rejoinder that the alleged plea of blank document is not a valid plea in the eye of law and alleged delay in disbursal are an afterthought and in any case irrelevant for the present proceedings. It is the case of the applicant that respondent suo moto had executed security and other loan documents while availing the loan. It is submitted that the respondent after carefully examining the terms and conditions of loan had executed the loan agreements. There is nothing on record to show as to why the express terms of commercial loan agreements duly executed, are not binding on the parties.

38. The respondent has also half-heartedly challenged the authority of Mr. Sagar Seth in filing the present application and also has challenged the written communication filed by the proposed IRP.

39. In this regard applicant has filed its copy of Board Resolution dated 17.08.2017, wherein Mr. Sagar Seth was duly authorized to file the present application under the Code on behalf of the applicant company. Therefore, the allegation that Mr. Sagar Seth has no authority cannot sustain. In pursuance of the objection on written communication, the proposed IRP has filed an additional affidavit on 17.10.2017 giving detailed information as required under the Regulations. He has also enclosed the certificate of registration issued in his favour by IBBI. The nomination of IRP cannot also be challenged on the ground that he is serving as RP in two proceedings. In the facts the objection of respondent company has no merit and cannot stand.

40. It is also the case of respondent that two winding up petitions against respondent company are pending

before Hon'ble High Court of Delhi and vide order dated 23.04.2015 a provisional liquidator has already been appointed in respect of respondent company and therefore the present application is not maintainable.

41. In this regard it is pertinent to refer to the order passed by Hon'ble Supreme Court in the matter of *Jaipur Metals and Electricals Employees Organization vs. Jaipur Metals and Electricals Ltd. and Ors.* reported in 2018(15)SCALE836 in which Hon'ble Supreme Court has observed that:

> *"17.....This proceeding is an independent proceeding which has nothing to do with the transfer of pending winding up proceedings before the High Court.* ***It was open for Respondent No. 3 at any time before a winding up order is passed to apply Under Section 7 of the Code.....***
>
> *18.....We are of the view that the NCLT was absolutely correct in applying Section 238 of the Code to an independent*

proceeding instituted by a secured financial creditor, namely, the Alchemist Asset Reconstruction Company Ltd." *(emphasis given)*

42. In view of the precedent laid down by Hon'ble Supreme Court, pendency of winding petition before High Court will not be a bar for initiating proceeding under Section 7 of the Code.

43. It is pertinent to mention here that the scheme of the Code provides for triggering the insolvency resolution process by three categories of persons namely,

a) Financial creditor

b) Operational creditor, and

c) Corporate debtor itself.

44. The procedure in relation to the Initiation of Corporate Insolvency Resolution Process by the "Financial Creditor" is delineated under Section 7 of the Code, wherein only "Financial Creditor" / "Financial Creditors" can file an application. As per Section 7(1) of

the Code an application could be maintained by a Financial Creditor either by itself or jointly with other Financial Creditors.

45. The expressions "Financial Creditor" and "Financial debt" have been defined in Section 5 (7) and 5 (8) of the Code and precisely "Financial debt" is a debt along with interest, if any, which is disbursed against the consideration for time value of money.

46. In the present case SBI had sanctioned and disbursed the loan amount recoverable with applicable interest by entering into loan agreements with the corporate debtor. The corporate debtor had borrowed the credit facility against payment of interest as agreed between the parties. The loan was disbursed against the consideration for time value of money with a clear commercial effect of borrowing. The outstanding debts have since been assigned in favour of the applicant. Moreover, the debt claimed in the present application includes both the component of outstanding principal and interest. In that view of the matter not only the

present claim comes within the purview of *'Financial Debt'* but also the applicant being the assignee can clearly be termed as *'Financial Creditor'* so as to prefer the present application under Section 7 of the Code.

47. The application filed by the applicant financial creditor under sub-section 5 (a) of Section 7 of the code, has to be admitted on satisfaction that:

i. *Default has occurred.*

ii. *Application is complete, and*

iii. *No disciplinary proceeding against the proposed IRP is pending.*

48. Hon'ble Supreme Court in the case of Mobilox Innovations Private Limited V. Kirusa Software Private Limited reported in AIR 2017 SC 4532 at Para 19 has observed that:

> *"Once the adjudicating authority / Tribunal is satisfied as to the existence of the default and has ensured that the application is complete and no disciplinary proceedings*

are pending against the proposed resolution professional, it shall admit the application. ***The adjudicating authority/Tribunal is not required to look into any other criteria for admission of the application."*** *(Emphasis given)*

49. An application of financial creditor under Section 7 of the Code is acceptable so long as the debt is proved to be due and there has been occurrence of existence of default. It is reiterated that the material on record clearly goes to show that respondent had availed the loan facilities and has committed default in repayment of the huge outstanding financial debt.

50. The material placed on record confirms that applicant financial creditor through deed of assignment has stepped into the shoes of SBI, who had disbursed various loan facilities to the respondent corporate debtor and the respondent has availed the loan and

committed default in repayment of the outstanding financial debt. On a bare perusal of Form – I filed under Section 7 of the Code read with Rule 4 of the Rules shows that the form is complete and there is no infirmity in the same. It is also seen that there is no disciplinary proceeding pending against the proposed IRP. Applicant has placed on record voluminous and overwhelming evidence in support of the disbursement as well as to prove the default. We are satisfied that the present application is complete in all respect and the applicant financial creditor is entitled to claim its outstanding financial debt from the corporate debtor and that there has been default in payment of the financial debt.

51. As a sequel to the above discussion and in terms of Section 7 (5) (a) of the Code, the present application is admitted.

52. Mr. Vikram Bajaj, having registration number IBBI / IPA - 002 / IP-N00003 / 2016-17 / 10003 resident of Flat No. 12, Vasudha Apartment, Plot – 41, Sector – 9

Rohini, Delhi – 110085 with email-id bajaj.vikram@gmail.com is appointed as the interim resolution professional.

53. In pursuance of Section 13 (2) of the Code, we direct that public announcement shall be made by the Interim Resolution Professional immediately (3 days as prescribed by Explanation to Regulation 6(1) of the IBBI Regulations, 2016) with regard to admission of this application under Section 7 of the Insolvency & Bankruptcy Code, 2016.

54. We also declare moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed:

> *"(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;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor."

55. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government or the supply of the essential goods or services to the Corporate Debtor as may be specified, are not to be terminated or suspended or interrupted during the moratorium period. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which has come into force w.e.f. 06.06.2018, the provisions of moratorium shall not apply to the surety in a contract of guarantee to the corporate debtor in terms of Section 14 (3) (b) of the Code.

56. The Interim Resolution Professional shall perform all his functions contemplated, inter-alia, by Sections 15, 17, 18, 19, 20 & 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, Rules and Regulations. It is further made clear that all the personnel connected with the Corporate Debtor, its promoters or any other person associated with the

Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional as may be required by him in managing the day to day affairs of the 'Corporate Debtor'. In case there is any violation committed by the ex-management or any tainted/illegal transaction by ex-directors or anyone else, the Interim Resolution Professional would be at liberty to make appropriate application to this Tribunal with a prayer for passing an appropriate order. The Interim Resolution Professional shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor' as a part of its obligation imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code, Rules and Regulations.

57. The office is directed to communicate a copy of the order to the Financial Creditor, the Corporate Debtor, the Interim Resolution Professional and the Registrar of Companies, NCT of Delhi & Haryana at the earliest

possible but not later than seven days from today. The Registrar of Companies shall update its website by updating the status of 'Corporate Debtor' and specific mention regarding admission of this petition must be notified to the public at large.

Sd/-

8. 3. 2019

(M.M. KUMAR)
PRESIDENT

Sd/-

(S. K. MOHAPATRA)
MEMBER (T)

Deepak Kumar