

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT NO. II**

CP No. 3460/IBC/NCLT/MB/MAH/2018

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

Bank of India

Head Office at: Star House, C-5, G-Block,
Bandra-Kurla Complex, Bandra (east),
Mumbai – 400 051 and

Branch Office at: N. G. Abdulpurkar
Complex, Nila Nagar, Samrat Chowk,
Solapur – 413 002

..... Petitioner (Petitioner/Applicant)

Vs.

Katare Spinning Mills Limited

Kamala, 259, Sakhar Peth, Solapur, 413 005

..... Corporate Debtor (Respondent)

Order pronounced on: 17.07.2020

Coram :

Hon'ble Suchitra Kanuparthi, Member (J)

Hon'ble Chandra Bhan Singh, Member (T)

For the Petitioner : Prajakta Menezes, Advocate.

For the Respondent : Nomaan Coatwalaa/w Rayyan Nasir and
Kishore Kotak, Advocate,

Per: Chandra Bhan Singh, Member (T)

ORDER

1. The Petitioner/Applicant viz. 'Bank of India' (hereinafter as **Petitioner**) has furnished Form No. 1 under Rule 4 of the

Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter as **Rules**) in the capacity of "Petitioner" on 30.08.2018 by invoking the provisions of Section 7 of the Insolvency and Bankruptcy Code (hereinafter as **Code**) against 'Katara Spinning Mills Limited' (hereinafter as '**Corporate Debtor**').

2. In the requisite Form, under the head "Particulars of Financial Debt" the total amount of Debt granted is stated to be Rs. 15,00,00,000/-, and the amount claimed to be in default is Rs. 23,90,64,696.69/- as on 28.08.2018. The date of default is stated to be 30.06.2015.

BRIEF HISTORY OF THE CASE

3. The Petitioner is a schedule bank and is a body corporate constituted under the provisions of the Banking Companies (Acquisition and Transfer of undertakings) Act, 1970. And the Corporate Debtor is a company registered under the Companies Act, 1956.
4. The Petition reveals that the Petitioner Bank sanctioned term loan facility of Rs. 9,00,00,000/- and a cash credit facility of Rs. 6,00,00,000/- to the Corporate Debtor vide a sanction letter dated 14.08.2013.
5. The Petitioner had enclosed the following security and other documents in support of the loan:
 - a. Sanction letter dated 14.08.2013.
 - b. Extract of Board Resolution dated 31.08.2013.
 - c. Demand promissory note executed by the Corporate Debtor on 26.09.2013.
 - d. Pay bearer letter dated 26.09.2013.
 - e. Multipurpose document L 516 dated 26.09.2013.
 - f. Hypothecation and loan agreement dated 26.09.2013.
 - g. Undertaking regarding payment of appropriate stamp duty dated 27.09.2013.
 - h. Letter of instalments dated 26.09.2013 executed by the Corporate Debtor.
 - i. Oral ascent executed by the Corporate Debtor on 26.09.2013.

- j. Deed of guarantee executed by Mr. Kishor Katare, Mr. Subhash Katare and Mr. Vijay Katare dated 26.09.2013.
 - k. CERSAI noting of charge regarding mortgage of collateral security dated 18.04.2015.
 - l. CERSAI noting of charge regarding mortgage of principal security dated 22.07.2016.
 - m. Acknowledgement of debt dated 31.08.2015.
 - n. Possession notice issued under section 13(4) of SARFAESI Act dated 30.03.2017.
 - o. Recall notices dated 17.03.2018 and 18.08.2018.
 - p. Copy of term loan and cash credit account statement.
6. The Petitioner by its additional affidavit dated 18.11.2019 further mentioned that, One Time Settlement (OTS) was offered to the Corporate Debtor for compromise under BOI OTS Revised Scheme 2018 for Rs. 1229.64 lakhs, as per the said OTS scheme the Corporate Debtor was bound to pay the entire OTS amount of Rs. 1229.64 lakhs by 31.03.2019 otherwise the said OTS would stand revoked. The Corporate Debtor failed to comply with the OTS scheme and pay the entire OTS amount by 31.03.2019 and the said OTS scheme stood revoked. This was informed by the Petitioner to the Corporate Debtor vide letter dated 04.03.2019.
7. Thereafter the Petitioner once again intimated the Corporate Debtor, a fresh OTS scheme offer vide letter dated 04.06.2019 clearly mentioning that tentative amount of Rs. 11.17 crore may vary and inter-alia subject to deposit Rs. 1.15 crore and submission of post-dated cheques (June 19 to Sept 19).
8. On 11.06.2019 the Corporate Debtor deposited Rs. 1.15 crore towards initial upfront amount with the request to approve the OTS. Vide letter dated 29.06.2019, the Petitioner approved the OTS scheme for an amount of Rs. 12.30 crore.
9. The said offer was subject to unconditional acceptance of the all terms and conditions which are mentioned in letter dated 29.06.2019 in entirety by the Corporate Debtor along with its Board Resolution for acceptance of OTS terms and conditions and authorizing the Director to execute necessary documents.

10. It is further mentioned by the Petitioner that the Corporate Debtor has not complied with the terms and conditions of the fresh OTS scheme and the same also stood revoked.
11. On 15.10.2019 the authorized officer of the Petitioner has communicated to the Corporate Debtor vide letter bearing no. SOL/SK/KSML/2019-20/06, that the OTS under reference stands permanently revoked and no further communication in this regard will be entertained.

REPLY OF THE CORPORATE DEBTOR

12. The Corporate Debtor filed reply to the petition not denying the liability but raising the following contentions:
 - i. The revised OTS was processed and an upfront amount of Rs. 1.15 crore and an amount of Rs. 8 lakhs totalling to Rs. 1.23 crore has been deposited with the Petitioner. While it is pertinent to note that the Corporate Debtor had earlier made an deposit of Rs. 1.23 crore previously with respect to first OTS settlement offer, the total amount paid by Corporate Debtor to the Petitioner with respect to satisfying the loan amounts is to the tune of Rs. 2.46 crores.
 - ii. The Corporate Debtor prayed to this Bench to direct the Petitioner to release and give peaceful possession of Hotel Tripur sundari in the same working and operating condition which was given as additional collateral by the Corporate Debtor to the Petitioner. Since the hotel mortgaged by the bank is worth more than the entire loan amount.
 - iii. The Petitioner by its first proposal titled "BOI ONE TIME SETTLEMENT 2018 – BOI OTS 2018 Revised Offer" for one time settlement vide its letter ref. no. SoL/2018-19/PKS/OTS/2 dated 18.12.2018 was offered to the Corporate Debtor. On an upfront initial deposit of Rs. 1.23 crores made by the Corporate Debtor, the consent terms were filed and the payment could not be made within the prescribed time frame

since there were some losses suffered and enough income could not be generated to satisfy the monthly instalments.

- iv. The Petitioner had themselves made a second proposal and after discussion and negotiations, the Petitioner offered second titled "BOI OTS 2019" for one time settlement vide latter dated 04.06.2019, wherein the conditions laid were that the tentative amount of OTS is of Rs. 11.17 crores and that the same would only be processed on an upfront initial deposit of Rs. 1.15 crores made by the Corporate Debtor. The said upfront initial deposit was made by the Corporate Debtor vide a cheque bearing no. 020437 which was issued to the Petitioner. Further a balance amount of Rs. 8 lakhs has been paid to the Petitioner as per the H. O. OTS 2019 circular dated 03.06.2019.
- v. The Corporate Debtor availed a loan facility of Rs. 15 crores from the Petitioner and the principal security i.e. Corporate Debtor's assets secured was valued at Rs. 30 crores.
- vi. After confirming with tentative amount of OTS of Rs. 11.17 crores as per BOI OTS 2019 which was offered to the Corporate Debtor, thereafter verifying the same to Rs. 12.30 crores is a humongous difference amounting to Rs. 1.13 crores which is unconstitutional and ultra vires basic principal of contract.

FINDINGS

13. On going through the submissions made by the Learned Counsel for the both the sides and on perusing the documents produced on record the Bench is of the view that, this Petition subsequent to its filing 30.08.2018, about 14 hearings have been taken place starting from 13.11.2018 to 06.01.2020 when it was Reserved for Orders. As far as Rs.23.90 crore in total consisting of term loan and cash credit with applicable rate of interest as per the sanction letter is concerned, there is no dispute and there also does not have an of iota of doubt regarding its pay-ability by the Corporate Debtor.

14. The account of the Corporate Debtor had become irregular and was declared as NPA on 31.03.2015. The total amount of Debt of Rs.23.90 crores including interest and other charges has been calculated up to 28.08.2018. The Bench also takes note of the fact that the financial debt of the Corporate Debtor stands duly acknowledged vide debit balance confirmation of 31.08.2015. This has also been duly acknowledged in the Balance sheet for the financial year 2015-16.
15. The bench also notes that CIBIL report confirming debt amount has been attached with the Petition. Therefore, it has been proved beyond doubt that the Corporate Debtor is in default of payment of Rs. 23.90 crore to the Petitioner i.e. Bank of India.
16. In fact, in reply dated 03.12.2018 by the Corporate Debtor, the Corporate Debtor has not contested that an amount is due and he is in default. The Corporate Debtor in its reply 03.12.2018 mentions that as per One Time Settlement Scheme (OTS) floated by the Bank on 20.06.2018, the Bank has given an opportunity to the Corporate Debtor to settle the amount as per the scheme. He further mentions that with the approval of the Board of Directors the Corporate Debtor has already made payment of about 5% of the outstanding balance as per the OTS-1 amounting to 80.25 lakhs to the Financial Creditor on 31.10.2018. He had also mentioned that in all probability the amount would be settled with the Financial Creditor.
17. It is for this reason that the Bench in its hearing up to 31.03.2019 could not take any call on the admission of this Section 7 Application because of the ongoing settlement as per the OTS-1, valid till 31.03.2019. This bench takes note of the fact that during OTS-1, the Corporate Debtor, instead of paying the total amount of Rs.12.3 crore as agreed as part of the OTS-1, paid a total amount of only Rs.1.23 crore. Therefore, this Bench feels that the Financial Creditor rightly revoked the OTS-1 as per the Terms and Conditions and treated this Rs1.23 crore as a normal recovery against the entire due.

18. It is under this background that in the hearing on 10.04.2019, the Bench took note of the fact and mentioned the following in its order of that day relating to this Petition:-

- *On the other hand an Officer of the Bank is present assisted by the Learned Counsel. He informed that OTS Scheme now stood closed as on 31.03.2019, therefore, Bank cannot entertain any settlement hence the Application for insolvency be Admitted.*
- *The Director has stated that on having discussion with the Higher Authorities of the Bank, there is possibility that they may help him in settling the matter if accepted by the Bank.*
- *It is directed to place on record the negotiations with the Bank Authorities then this Bench is compelled to decide this petition of Bank of India on merits on the next date of hearing.*

19. This Bench notes that on the next of hearing, i.e on 27.5.2019, it was mentioned before it that there is fresh negotiation going on between the Corporate Debtor and Financial Creditor for settling the debt. This is evident from the daily order dated 27.05.2019, relevant portions of it reproduced below:

1. *Both sides are present.*
2. *On one hand the bank has filed this Petition u/s 7 and on the other hand negotiating with the Corporate Debtor by accepting an amount of ₹1.23 crores. Since the Bank/Petitioner is negotiating with the Debtor Company and the Debtor Company had again offered OTS in 5 equal instalments vide letter dated 24.05.2019, therefore, a query has been raised that how this Petition is maintainable u/s 7 of the IBC. Query is to be answered by 24.06.2019.*
3. *Matter is now listed on 24.06.2019.*

20. It was brought up before the Bench through additional affidavit by the Petitioner that another OTS scheme, OTS-2019, has been intimated to the Corporate Debtor with a tentative amount of Rs.11.17 crore, clearly mentioning that this amount may vary.

21. Subsequently on 26.09.2019, the Bank intimated the Corporate Debtor about the approval of OTS-19 at a total amount of Rs.12.3 crore (as the OTS amount, the Bank mentions, cannot be less than previous OTS amount) with the condition as under:-
- i. 10% of the OTS amount to be paid by 28.07.2019;
 - ii. 4 posts dated cheques;
 - iii. Resolution of the Board of the company accepting the OTS-19.
22. This Bench also takes note of the fact that, vide letter dated 28.07.2019 the Corporate Debtor agreed to deposit Rs. 1.23 crore as the upfront amount. Out of which Rs. 1.15 crores were already paid by the Corporate Debtor. Hence the balance amount of Rs. 8 lakhs has been deposited by the Corporate Debtor towards the upfront amount i.e. the 10% of OTS-19 amount. However, since there was neither any Board Resolution passed by the Corporate Debtor accepting the OTS-19 scheme nor any further amount in addition to the initial 10 percent deposited, the Bank revoked the OTS -2019 for failing to adhere to the scheme in its entirety and non-communication of unconditional acceptance of terms and conditions with proper Board Resolution.
23. Therefore, it can be seen that till October 2019, this Bench, because of the OTS-1 scheme and thereafter OTS-19 scheme and the ongoing negotiation between the parties, could not take up the matter for hearing under section 7 for admitting the Petition. The contention of the Corporate Debtor regarding failure of the OTS-2019 is that the Bank of India did not agree to settle amicably and insisted for a total amount of Rs. 12.3 crore and not Rs. 11.17 crore, the tentative amount. However, looking into the facts, the Bench has no doubt in its mind that the Corporate Debtor had clearly agreed by its letter 18.07.2019 that the total OTS amount is Rs. 12.3 crores. By paying Rs.8 lakhs over above Rs.1.15 crore the Corporate Debtor was well aware about the final settlement amount of Rs. 12.3 crore as 10% of it is Rs. 1.23 crore. This is conclusively proved by the letter of 18-07-2019 reproduced below:

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18th July 2019

*The Chief Manager,
Bank of India,
Main Branch,
Solapur-413002*

Sub:-BOI OTD 2019

Dear Sir,

We are in receipt of your letter No. BOI/SOL/2019-20/OTS/02 dt.29/6/2019 personally delivered by your officer at our office on 5/7/2019 and according to your offer, we have deposited Rs. 1/15 Cr against initial application money and now you have accepted our application and conveyed your acceptance of OTS amount of Rs. 1230 Lacs. Now, we have to deposit 10% of the OTS amount as upfront money within 30 days from the date of conveying of your approval (i.e. 5/7/2019).

In this connection, we will deposit balance payment amount of Rs. 8 Lacs against 10% OTS amount after adjusting application money deposited at the time of application before 4/8/2019.

We once again thank you for your kind co-operation for the same.

Thanking you,

Yours Faithfully,

Katara Spinning Mills Limited”

The above letter of 18.07.2019 sent by the Corporate Debtor to the Financial Creditor as (attached) clearly brings out this fact.

24. The contention of the corporate debtor that the Hotel property (Hotel Tripur Sundari) in possession of the Petitioner as collateral security be handed over to them is not a tenable proposition in the consideration of this Bench. This Hotel property has been mortgaged as a collateral security to the Financial creditor. The Financial creditor after the loan account became NPA was constrained to approach SARFAESI and through valid Possession notice issued under 13(4) of the SARFAESI Act, 2002 took symbolic possession of the mortgaged properties including the hotel. The Bench finds that the Financial Creditor acted in a legal manner and rightfully took possession of the Hotel Property.
25. In view of the above, this Bench has no doubt that the Corporate Debtor M/s. Katara Spinning Mills Limited had a total debt of Rs. 23.90 crores and also defaulted on OTS-2018 and OTS-2019 schemes.

26. Considering the above facts, the Bench concludes that the nature of Debt is a "Financial Debt" as defined under section 5 (8) of the Code. It has also been established that there is a "Default" as defined under section 3 (12) of the Code on the part of the Debtor. The two essential requirements, i.e. existence of 'debt' and 'default', for admission of a petition under section 7 of the I&B Code, have been met in this case.
27. Further, the Bench also perused the Form – 2 i.e. written consent of the proposed Interim Resolution Professional submitted along with this application/petition by the Petitioner and there is nothing on record which proves that any disciplinary action is pending against the said proposed Interim Resolution Professional. The Petitioner has proposed the name of Insolvency Professional. The IRP proposed by the Petitioner, Mr. Vitthal M. Dahake, having office at 93, Bora Bazar Street, Jain Sthanak, Fort, Mumbai, having registration No. IBBI/IPA-003/IP-N000117/2017-18/11296, is hereby appointed as Interim Resolution Professional to conduct the Insolvency Resolution Process.
28. Having admitted the Petition/Application, the provisions of **Moratorium** as prescribed under **Section 14 of the Code** shall be operative henceforth with effect from the date of order, and shall be applicable by prohibiting institution of any Suit before a Court of Law, transferring/encumbering any of the assets of the Debtor etc. However, the supply of essential goods or services to the "Corporate Debtor" shall not be terminated during Moratorium period. It shall be effective till completion of the Insolvency Resolution Process or until the approval of the Resolution Plan prescribed under Section 31 of the Code.
29. That as prescribed under **Section 13 of the Code** on declaration of Moratorium the next step of **Public Announcement** of the initiation of Corporate Insolvency Resolution Process shall be carried out by the IRP immediately on appointment, as per the provisions of the Code.
30. That the Interim Resolution Professional shall perform the duties as assigned under **Section 18** and **Section 15** of the Code and inform

the progress of the Resolution Plan and the compliance of the directions of this Order within 30 days to this Bench. A liberty is granted to intimate even at an early date, if need be.

31. The Petition is hereby **"Admitted"**. The commencement of the Corporate Insolvency Resolution Process shall be effective from the date of the Order.
32. Ordered Accordingly.

SD/-
Chandra Bhan Singh
Member (Technical)
17.07.2020

SD/-
Suchitra Kanuparthi
Member (Judicial)