

Objections raised by Corporate Debtors to Applications filed under Section 7 of the Insolvency and Bankruptcy Code, 2016

by

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Section 7 of the Insolvency and Bankruptcy Code, 2016 (“Code”) provides for a statutory right in favour of a financial creditor to initiate the corporate insolvency resolution process of a corporate debtor on the occurrence of a default. The default referred to herein above is in respect of a financial debt owed to any financial creditor. The Code entails only a summary adjudication by the Adjudicating Authority wherein to admit an application, it needs to be satisfied only with regard to the existence of a default and ensure that the application is complete and no disciplinary proceedings are pending against the proposed resolution professional. The Adjudicating Authority is not required to look into any other criteria for admission of the application. However, since the proceeding for declaration of insolvency of a company has drastic consequences for a company it has been held that a corporate debtor cannot be condemned unheard and the Adjudicating Authority is obliged to afford a reasonable opportunity to the corporate debtor to contest such claim of default by filing a written objection or any other written document as the Adjudicating Authority may direct and provide a reasonable opportunity of hearing to the corporate debtor prior to admitting the petition filed under Section 7 of the Code.¹ The Article seeks to analyse various objections that have been raised by the Corporate Debtor from time to time and the Adjudicating Authority’s perspective towards the same.

I. There is no Financial Debt

The entire foundation of an application under Section 7 of the Code is based on the premise that there is a default in relation to a financial debt. A corporate debtor is thus entitled to contend that the alleged debt is not a financial debt.² Whether or not a debt is a financial debt will depend upon the facts and circumstances of each case. Where the Corporate Debtor claimed that the amount paid by the Applicant Financial Creditor was towards the equity contribution for a project and produced the ledger account to that effect, it was held that the Applicant Financial Creditor has failed to prove the basic requirement that the amount advanced is a financial debt as provided under the Code and the application was rejected.³

¹ *Sree Metaliks Limited and another v. Union of India and Anr.*, W.P. 7144 (W) OF 2017, High Court of Calcutta.

² Sections 5(7) and 5(8) of the Insolvency and Bankruptcy Code 2016.

³ *Jagdambey International v. Visa Powertech Pvt. Ltd*, CP (IB)- 4023/I&BP/MB/2018, Order dated 06.03.2019, NCLT Mumbai.



II. Debt is barred by limitation

Section 238A of the Code provides that the provisions of the Limitation Act, 1963 (36 of 1963) shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case may be. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application.⁴

III. Dispute over amount of default

Any dispute over the amount of default cannot be a ground for rejection of an application under Section 7 of the Code, as the determination of quantum of financial debt is not within the domains of the Adjudicating Authority. In proceedings under Section 7 of the Code, 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. Any objection with regard to amount would be maintainable before the Committee of Creditors. Once a default in terms of Section 4 of the Code is established and all other requirements are fulfilled, the insolvency resolution process has to be triggered.⁵

IV. Settlement/ Compromise

Merely because the financial creditor had given various opportunities of settlement and repayment, it does not bar the financial creditor from initiating proceedings under the provisions of Code.⁶ In the absence of any binding compromise agreement/ debt restructuring approval, it is beyond the powers of the Adjudicating Authority to extend time indefinitely or to defer the prayer of applicant financial creditor for admission of the petition filed under Section 7 of the Code.⁷

⁴ *B.K. Educational Services Private Limited v. Parag Gupta and Associates*, Civil Appeal No.23988 of 2017.

⁵ *Bank of India v. Tirupati Infraprojects Pvt. Ltd.*, IB-104(PB)/2017; *IFCI Limited v. Era Housing & Developers (India) Limited*, (IB)-489(PB)/2017, order dated February 8, 2018, NCLT Delhi.

⁶ *Bank of Baroda v. M/s BRYs Hotels Pvt. Ltd.*, C.P. NO. IB- 1527 (PB)/2018, NCLT Delhi.

⁷ *PNB v. Dynamic Shells (India) Pvt. Ltd.*, Company Petition No. (IB)-718 (PB)/ 2018, NCLT Delhi.

V. *No express agreement with regard to the transaction*

Mere grant of loan by the Financial Creditor and its admission by the Corporate Debtor in the absence of substantive evidence to prove the disbursement of loan amount by the alleged Financial Creditor, that too for consideration for the time value of money will not treat the petitioner as a Financial Creditor, till it shows that the arrangement complies with the substantive definition or any one or other clause of Section 5(8) of the Code.⁸ Where the corporate debtor argued that the Financial Creditor has failed to prove the existence of an agreement as regards the payment of interest on the amount advanced, the Adjudicating Authority held that although there is no express agreement to the loan arrangement or the payment of interest thereon, but there are acknowledgements of the Corporate Debtor, not once but many a times, which reveal that the Financial Creditor and the Corporate Debtor shared a creditor-debtor relationship. It was further held that the Code nowhere prescribes the compulsory existence of an express agreement to prove the loan and its disbursement, but defined in Section 5(8) the conditions under which a transaction be treated as a 'Financial Debt'.⁹

VI. *Application is not filed by an authorised person*

A Corporate Debtor can also challenge that the Application has not been filed by an authorised person. Under the Code, it is only an "authorised person" as distinct from "Power of Attorney Holder" who can make an application under Section 7. It has been held that the provision of the Power of Attorney Act, 1882 cannot override the specific provision of a statute which requires that a particular act should be done by a person in the manner as prescribed thereunder. In view of the same, it has been held that a 'Power of Attorney Holder' is not competent to file an application on behalf of a 'Financial Creditor'.¹⁰

VII. *Company is solvent*

The execution of alleged work orders and facilities sanctioned by the other financial institutions has no relevance in deciding admission of the application filed under Section 7, when there is no specific denial to the existence of default to the applicant bank. If there is a debt and default and application by financial creditor under Section 7 of the Code is complete, the Adjudicating Authority is bound to admit the application. Claim of respondent

⁸ *Sanjay Kewalramani v.. Sunil Parmanand Kewalramani & Ors.* [Company Appeal (AT) (Insolvency) No. 57 of 2018], Order dated 02.02.2018.

⁹ *Anchor Leasing Private Limited v. Euro Ceramics Limited*, CP No. 66/IBC/NCLT/MB/MAH/2018, Order dated 25.02.2019, NCLT Mumbai.

¹⁰ *Palogix Infrastructure Private Limited v. ICICI Bank Limited*, Company Appeal (AT) (Insol.) No. 30 of 2017", Order dated 20th September, 2017.



that it is a solvent company is of no ground, once there is default in repayment of the loan to the applicant financial creditor.¹¹

VIII. Pendency of proceedings

If any action has been taken by a Financial Creditor under Section 13(4) of the SARFAESI Act, 2002 against the Corporate Debtor or a suit is pending against Corporate Debtor under Section 19 of RDB Act, 1993 before a Debt Recovery Tribunal or appeal pending before the Debt Recovery Appellate Tribunal, the same cannot be a ground to reject an application under the Code.¹² Section 7 application filed under the Code is an independent proceeding, which has nothing to do with the pendency of any criminal or civil proceedings.¹³

CONCLUSION:

The above would thus show that the Adjudicating Authority seldom rejects the application on miscellaneous grounds. It is only in cases where substantive issues such as limitation or nature of debt etc. are involved that the Adjudicating Authority may reject the application depending upon the facts of each case. This approach is indeed in consonance with the intent and object of the Code, which does not require the Adjudicating Authority to go into the nitty gritty of each and every dispute. This approach is towards facilitating resolution. However, since the law is relatively new, Adjudicating Authorities and other Courts are still evolving the law and we may see more objections in the coming time while opposing the applications filed under Section 7 of the Code, with changing circumstances and facts of each case.

¹¹ *ICICI Bank Ltd. v. Jyoti Buildtech Pvt. Ltd.*, Company Petition No. (IB)-1362(PB)/2018, NCLT Delhi.

¹² *Unigreen Global Private Limited v. Punjab National Bank*, Company Appeal (AT) (Insolvency) No. 81 of 2017, Order dated 1.12.2017.

¹³ *Yes Bank Ltd. v. M/s Namu Alloys Pvt. Ltd.*, Company Petition No. (IB)- 867 (PB)/ 2018, NCLT Delhi.