

IN THE NATIONAL COMPANY LAW TRIBUNAL MUMBAI - BENCH-VI

CP (IB) No. 250/MB/2022

[Under Section 7 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016]

IN THE MATTER OF:

PRUDENT ARC LIMITED

[PAN No. AAGCP2093M]

Registered Office: 611, D Mall

Plot No. A-1, Netaji Subhash Place, Pitampura

New Delhi-110034, New Delhi.

...Financial Creditor

V/s

SHIRPUR GOLD REFINERY LIMITED

[CIN: L51900MH1984PLC034501]

Registered Office: Refinery Area

Shirpur, Taluka Shirpur, District Dhule

Shirpur-425405, Maharashtra.

...Corporate Debtor

Pronounced: 24.06.2024

CORAM:

HON'BLE SHRI K. R. SAJI KUMAR, MEMBER (JUDICIAL)

HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)

Hearing: Hybrid

Appearances:

Financial Creditor: Adv. Nausher Kohli a/w Adv. Harsh L. Behany and Adv.

Saloni Manjrekar i/b. HN Legal

Corporate Debtor: Adv. Ashish Pyasi a/w. Adv. Vinita Melvin i/b. ANB Legal

ORDER

[Per: K. R. SAJI KUMAR, MEMBER (JUDICIAL)]

1. BACKGROUND

1.1 This Application bearing C.P. (IB) No. 250/MB/2022 was filed on 29.12.2021, under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (AA Rules) by Industrial Finance Corporation of India (IFCI / Original Lender), through its Assistant General Manager (Law) Ms. Yamini Das, and now replaced by Prudent ARC Limited, the Financial Creditor (FC), for initiating Corporate Insolvency Resolution Process (CIRP) in respect of Shirpur Gold Refinery Limited, the Corporate Debtor (CD).

1.2 The total amount of default alleged is Rs.91,98,84,982.20/- (Ninety-One Crore Ninety-Eight Lakh Eighty-Four Thousand Nine Hundred Eighty-Two Rupees and Twenty Paise), including the principal amount of Rs. 65,00,00,000/- along with the amount of Rs.26,44,83,005.20/- as monthly interest up to 14.10.2021, calculated at the rate of 14 (Fourteen) per cent. per annum as well as the accrued interest of Rs.54,01,977/- calculated from 15.10.2021 to 28.10.2021 calculated at the rate of 14 (Fourteen) per cent. per annum. It is based on default in repayment of loan for Rs. 65,00,00,000/- sanctioned by the Original Lender to the CD.

1.3 The date of default as mentioned in Part IV of the Application is 31.12.2019 i.e., the date on which the CD's account was classified as Non-Performing Asset (NPA) by the Original Lender. Since the CD defaulted in payment of its

outstanding dues, the Original Lender prayed that CIRP may be initiated in respect of the CD under Section 7 of the IBC.

1.4 An Interlocutory Application, IA No. 4914/2023 dated 16.10.2023 was filed by Prudent ARC Ltd. (FC), by placing on record the Assignment Agreement dated 29.08.2023 by which the Original Lender has assigned the debt to it and praying for its substitution with the Original Lender. The CD did not make any objection to the said IA and *vide* order dated 27.10.2023, we allowed Prudent ARC Ltd. to carry out necessary amendments in the Application and to pursue the same as FC.

2. CONTENTIONS OF FC

2.1 It is submitted that the Original Lender is a statutory Non-Banking Financial Company registered under the Companies Act, 1956, while the CD is a private company, engaged in the business of gold refinery. For the purpose of meeting long-term working capital requirements, the CD sought credit facilities from the Original Lender and obtained loan of Rs. 65,00,00,000/- (Sixty-Five Crore Rupees) by executing several documents for securing the same.

2.2 The following documents are relied upon by the FC in the present matter:

- a) CD's Board Resolution dated 21.08.2017 regarding acceptance of terms and conditions of the Original Lender's Letter of Intent dated 09.08.2017;
- b) Copy of Accepted and modified Letter of Intent dated 21.11.2017;
- c) Corporate Loan Agreement dated 28.11.2017 (Loan Agreement)
- d) Copy of Undertaking dated 28.11.2017 issued to the Original Lender by the CD;
- e) Undertaking letter dated 28.11.2017 by the CD regarding invocation of Strategic Debt Restructuring scheme;

- f) CD's Letter dated 28.11.2017 regarding wilful defaulters' undertaking;
- g) Hypothecation Deed dated 28.11.2017 and 29.03.2018;
- h) Certificates of Registration of Charge dated 28.11.2017 and 29.03.2018;
- i) Copy of CD's undertaking dated 11.12.2017 to the FC as regards maintaining excess shares of Zee Media Corporation Limited (ZMCL), Zee Entertainment Enterprises Limited, Dish TV India Limited and the CD to the extent of Rs. 32.50 Crores;
- j) Copy of 'PAN India's undertaking dated 11.12.2017 to the FC as regards maintaining excess shares of ZMCL and the CD to the extent of Rs. 32.50 Crores;
- k) Letters dated 31.03.2018 and 14.05.2018 issued by the IDBI Trusteeship Services Limited to the lenders, including the Original Lender, regarding custody of documents for securing credit facilities.
- l) Copy of Balance Confirmation Certificate dated 21.10.2021; and
- m) Certificate dated 28.10.2021 under Section 2(A)(a) of the Banker's Books of Evidence Act, 1891.

2.3 Pursuant to the Letter of Intent dated 09.08.2017 sanctioning credit facilities to the tune of Rs. 65,00,00,000/-, the Original Lender disbursed Rs. 32,50,00,000/- to the CD on 07.02.2018, while the remaining Rs. 32,50,00,000/- was disbursed on 14.06.2018. The Original Lender has produced the Statement of Account for the period of 24.07.2017 to 28.10.2021.

2.4 The Ld. Counsel for the FC submitted that, as per the aforesaid Loan Agreement, it was mutually decided between the Original Lender and the CD that the loan shall have a moratorium period of 18 (Eighteen) months from the date of first disbursement (07.02.2018), which was to be repaid in

eighteen structured quarterly installments. The said repayment was to be commenced after the moratorium, while Clause 2.2 of the Loan Agreement clearly stated that interest was to be paid monthly by the CD on the 15th (Fifteenth) day of each month. Clauses 7.1 and 7.2 of the Loan Agreement mandated the Original Lender to initiate legal action against the CD in the event of default in the payment of the principal amount or the interest.

2.5 The CD used to be regular in paying interest during the period of 2017-2018; however, it started defaulting from April 2019 and failed in paying the interest for July 2019. Thus, the CD committed default in paying interest as on 15.07.2019 and continued to make default in payment of the principal amount as is evident from its failure to pay the first quarterly installment which was due on 31.10.2019. On account of CD's failure to repay the aforesaid loan, its account was declared NPA on 31.12.2019 by the Original Lender. Subsequently, the Original Lender issued Loan Recall Notice on 17.03.2020 seeking repayment of Rs. 71,47,83,132.20/- along with accrued interest as on 15.02.2020, which was not replied to by the CD. Due to the non-response of the CD to the Loan Recall Notice, the Original Lender issued Demand Notice dated 01.07.2020, under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) to the CD claiming the outstanding Rs. 75,21,16,172.20/-, as on 22.06.2020, including further interest thereon w.e.f. 23.06.2020, at the contractual rates as well as costs, charges, expenses and other monies until payment or realisation.

- 2.6 It is further submitted that after issuing SARFAESI notice dated 01.07.2020, the FC has provided certificate of balance confirmation dated 21.10.2021, for which also there was no response from the CD.
- 2.7 During the course of the proceedings, the CD's loan account was assigned to the FC (Prudent ARC Limited) by the Original Lender (IFCI) vide Assignment Agreement dated 29.08.2023. The FC further stated that OTS proposals dated 22.03.2021 and 04.08.2021, produced by the CD in its Affidavit-in-reply, amount to acknowledgment of financial debt owed to the FC.
- 2.8 The FC has produced record of default of the CD from the report of Credit Information Bureau India Limited (CIBIL) as on 29.01.2018 and also the Assignment Agreement dated 29.08.2023, wherein 31.12.2019 is mentioned as the date of NPA of the account of the CD.
- 2.9 The Ld. Counsel for the FC contended that the CD has never disputed the existence of loan amount disbursed to it by the Original Lender and, hence, there is clear admission of default, for which reason alone CIRP needs to be initiated.

3. CONTENTIONS OF CD

- 3.1 The CD contended that the Original Lender has provided incorrect date of default in Part IV of the Application as 31.12.2019, being the date of declaring its account as NPA. On the contrary, it had mentioned 15.07.2019, as date of default, in the Loan Recall notice dated 17.03.2020. Hence, there is misrepresentation as to the date of default by the Original Lender. The Ld. Counsel for the CD submitted that if 15.07.2019 is taken as the date of

default, the actual default would have been ninety days prior to that date, and, therefore, the NPA date as date of default cannot be determined under the provisions of Section 7 of the IBC.

3.2 The Ld. Counsel for the CD further submits that the Loan Agreement dated 28.11.2017, relied upon by the FC, is neither an admissible nor enforceable document since it is insufficiently stamped under the provisions of the Maharashtra Stamp Act, 1958 (MS Act). As the aforesaid document is not admissible in evidence, even the Original Lender could not have claimed to be a financial creditor, based on a legally unenforceable document. It is further submitted that the CD had attempted to amicably settle the matter, with various lenders including the Original Lender (IFCI), *vide* its letter dated 22.03.2021. It had proposed OTS, offering aggregate amount of Rs. 70,00,00,000/- on or before 30.09.2023, against the total outstanding dues to all the lenders of Rs. 283.16 Crores and, again, revised its proposal to Rs. 80,00,00,000/- *vide* its letter dated 04.08.2021 to the lenders. However, both the OTS proposals sent by the CD were rejected by the lenders including the Original Lender; hence, the present Application is not maintainable. Therefore, it can only be presumed that the Original Lender has approached this Tribunal with malafide intention to harass the CD for the purposes of recovery of debt, which is against the objectives of the IBC. Moreover, its assets mortgaged and hypothecated with the Original Lender are of high value and the alleged dues are appropriately secured by them. The Application has no objective to serve other than causing adverse effect to the

CD's interest. As the Original Lender has failed to establish a case, there is no need for commencement of CIRP, so far as the CD is concerned.

4. ANALYSIS AND FINDINGS

4.1 We have perused all the documents and pleadings and heard both the Ld. Counsel for the FC and the CD.

4.2 The major issues raised by the CD are (i) incorrect date of default; (ii) insufficiently stamped Loan Agreement dated 28.11.2017; and (iii) non-acceptance of OTS proposals by the FC. Now, let us examine the issues.

4.3 Upon perusal of the documents, we find that the FC mentioned 31.12.2019, i.e., the date of declaring CD's loan account as NPA as date of default in Part-IV of the Application. The Ld. Counsel for the CD argued that this date cannot be regarded as the default date, as the actual date of default should be 15.07.2019, i.e., the date on which the CD failed to make payment of the interest of July 2019, as contained in the Loan Recall Notice sent to it by the Original Lender dated 17.03.2020. We find that the first disbursement of loan of Rs. 32.5 Crore was made to the CD by the Original Lender on 07.02.2018 and the second disbursement of Rs. 32.5 Crore on 14.06.2018, completing the entire disbursement as per the Loan Agreement. A moratorium of 18 months was available to the CD from the date of the first disbursement, i.e., 07.02.2018. The loan was sanctioned for a tenure of 6 years, with a payment schedule as contained in the said Agreement. It was agreed that non-payment of any installments of interest and other amounts would amount to a default by the CD. These are also reflected in the Letter of Intent dated 09.08.2017, by the Original Lender. Hence, it can be presumed that any non-

payment of interest including principal would constitute a default. From the above, we find that the CD was obligated to pay the principal amount in 18 monthly installments commencing after the expiry of moratorium. The moratorium expired in August, 2019 and the CD's liability to repay the principal amount arose from September, 2019. Since the CD did not make any payment, as per the default cum outstanding statement produced by the Original Lender, the account of the CD was turned to NPA on 31.12.2019. The same date, 31.12.2019, is mentioned as the date of default in Part-IV of the Application.

4.4 According to the Ld. Counsel for the CD, the actual date of default should be 15.07.2019, when the CD failed to pay outstanding interest. On examination of the Loan Agreement, we find that para 7.1(a) categorically states that ***“Default has been committed by the Borrower in the payment of principal sum of the Loan on the due dates as per the Financing Documents...”*** (Emphasis Supplied). The expression “Financing Documents” has been defined in the Loan Agreement, *inter alia*, to mean ***“...this Agreement, the Security Documents, and any other related and relevant documentation between the Borrower and the Lender in relation to the Loan.”*** (Emphasis Supplied). Hence, it can be seen that non-payment of principal sum of the loan also constitutes default. It is undisputed that the Original Lender *vide* Loan Recall Notice dated 17.03.2020, in para 5 stated that the Borrower (CD herein) has committed defaults in payment of installments of principal, interest and other monies due in terms of the Loan agreement on 15.07.2019, and called upon it to pay a sum of Rs.71,47,83,132.20/- in 15 days. The

account of the CD was converted into NPA on 31.12.2019. The actual default can be determined to be 90 days prior to the same, say, 30.09.2019. The present Application was filed on 29.12.2021, which is within the period of limitation. Even assuming that the date of default is taken as 15.07.2019, as contained in the Loan Recall Notice, the Application is not time-barred. The defaulted amount by the CD on both the above dates is more than one crore rupees. The law is already settled that Section 7 comes into play when a corporate debtor commits default and not only on the declaration of loan account of the debtor as NPA. The Principal Bench of the Hon'ble NCLAT, New Delhi in *Milind Kashiram Jadhav Vs. State Bank of India and Anr.* [Company Appeal (AT) (Insolvency) No. 1589 of 2023] held that the date of NPA classification serves as a valid "date of default" for initiating insolvency proceedings. Even after classification of account as NPA, the CD continued to be in default of more than one crore rupees. In view of the foregoing, we reject the CD's contention on this issue.

4.5 Now comes the issue of insufficiently stamped Loan Agreement dated 28.11.2017 executed between the parties. The Ld. Counsel for the CD argued that the Loan Agreement does not comply with the provisions of MS Act, and, therefore, this Application is not maintainable. However, we are unable to appreciate this position, as in proceedings under the IBC, being summary in nature, it is not for the Adjudicating Authority to get into stamp duty issues in a given document. We hold that admissibility or otherwise of a Section 7 IBC Application is not dependant on the sufficiency or deficiency of stamp duty, liable to be levied on any document executed between the

parties, and the law on this aspect is already settled. The Hon'ble Madras High Court in *SpiceJet Limited Vs. Credit Suisse AG* [2022 SCC OnLine Mad 112], took the view that at the time of admission of winding petition, the point of issue is not whether the document sought to be relied on by the petitioner is sufficiently stamped or stamped at all. The Hon'ble Court further held that the only point to be verified is whether the debt is bonafide, disputed and whether the defence is substantial one. The position has also been recently clarified by the Hon'ble Supreme Court in *In Re: Interplay between Arbitration Agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act 1899*, [Curative Petition (C) No. 44 of 2023 in Review Petition (C) No. 704 of 2021 in Civil Appeal No. 1599 of 2020], wherein it held that unstamped or inadequately stamped agreements cannot be rendered void ab initio or unenforceable as non-stamping or inadequate stamping is a curable defect. In the instant matter, we are not required to deal with the curability of any such defect. Further, we have held in *Axis Bank Limited Vs. Morarjee Textiles Limited* [CP(IB) No. 1318/MB-VI/2022], and in many other cases, that it is for the civil courts / authorities to determine sufficiency or deficiency of stamp duty paid on a document, and that such technical pleas are not relevant or acceptable in a Section 7 Application under the IBC. The debt, liability and default of the CD are proved from the entries in Banker's Book; Section 13(2) SARFAEASI notice dated 01.07.2020; and OTS proposals dated 22.03.2021 and 04.08.2021. We find that the Statement of Account produced by the FC, as well as Certificate of Registration of Charge dated 28.11.2017 and 29.03.2018, match with the details of asset charges in

the Ministry of Corporate Affairs' record. All the above corroborate the disbursement of loan to the CD by the Original Lender and that the debt is in default and continuing as on date. In view of the foregoing, this issue is found against the CD.

4.6 As far as the issue of non-acceptance of OTS proposal is concerned, the Hon'ble Supreme Court in *Bijnor Urban Cooperative Bank Limited, Bijnor and Ors. Vs. Meenal Agarwal and Ors.*, [Civil Appeal No. 7411 of 2021] clearly held that the granting benefit under OTS is always subject to eligibility criteria and guidelines issued from time to time and the bank can take prudent decision to reject the OTS proposal, depending upon their commercial wisdom, taking public interest and other factors into consideration. Relying on the decision in *Bijnor Urban Cooperative Bank Limited* (Supra), the Principal Bench of the Hon'ble NCLAT, New Delhi, in *Sanjeev Mahajan Vs. India Bank (Erstwhile Allahabad Bank) & Anr.* [Company Appeal (AT) (Insolvency) No. 3 of 2022], also held that although settlement has to be encouraged in IBC matters, no direction can be issued to a financial creditor to positively grant the benefit of OTS to a borrower. Furthermore, neither the CD can, as a matter of right, pray for grant of benefit of OTS nor the FC can be compelled to accept a lesser amount under the OTS Scheme despite the fact that it is able to recover the entire loan amount by auctioning the secured property / mortgaged property. The Lenders including the Original Lender, in their commercial wisdom, did not accept the OTS proposals made by the CD, and, therefore, we do not accept the CD's contention that non-acceptance of

OTS proposal is a valid ground for rejecting a Section 7 Application. Thus, the issue is also decided against the CD.

4.7 The FC has thus successfully demonstrated and proved the debt and default in this case. It is noted that the CD has admitted the outstanding debt. Therefore, we are of the considered view that this Application is complete and satisfies all the necessary requirements for admission under Section 7 of the IBC.

4.8 The FC has proposed the name of Mr. Ashish Vyas, a registered Insolvency Professional having Registration Number-IBBI/IPA-001/IP-P01520/2018-2019/12267 as the Interim Resolution Professional (IRP), to carry out the functions as mentioned under the IBC. The proposed IRP has given its written consent and the same is placed on record.

ORDER

This Application bearing C.P. (IB) No. 250/MB/2022 under Section 7 of the IBC, filed by Prudent ARC Limited, the FC, for initiating CIRP in respect of Shirpur Gold Refinery Limited, the CD is **admitted**.

We further declare moratorium u/s 14 of the IBC, with consequential directions as follows:

I. We prohibit-

- a) the institution of suits or continuation of pending suits or proceedings against the CD 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 CD 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 CD in respect of its property including any action under the SAEFAESI Act, 2002;
 - d) the recovery of any property by an owner or lessor where such property is occupied by or in possession of the CD.
- II. That the supply of essential goods or services to the CD, if continuing, shall not be terminated or suspended or interrupted during the moratorium period.
- III. That the order of moratorium shall have effect from the date of this order till the completion of the CIRP or until this Bench approves the resolution plan under section 31(1) of the IBC or passes an order for the liquidation of the CD under section 33 thereof, as the case may be.
- IV. That the public announcement of the CIRP shall be made in accordance with the provisions of the IBC, the Rules and Regulations made thereunder.
- V. That this Bench hereby appoints **Mr. Ashish Vyas**, a registered Insolvency Professional having Registration Number- IBBI / IPA-001 / IP-P01520 / 2018-2019 / 12267 and **e-mail- ashishvyas2006@gmail.com** having valid Authorisation for Assignment up to 24.10.2024 as the Interim Resolution Professional (IRP) to carry out the functions under the IBC. The fee payable to IRP / RP shall be in accordance with the Regulations / Circulars issued by the IBBI.
- VI. During the CIRP Period, the management of the CD shall vest in the IRP or, as the case may be, the RP in terms of Section 17 or Section 25, as the

- case may be, of the IBC. The officers and managers of the CD shall provide all documents in their possession and furnish every information in their knowledge to the IRP within a period of one week from the date of receipt of this Order, in default of which coercive steps will follow.
- VII. In exercise of the powers under Rule 11 of the NCLT Rules, we order the FC to deposit a sum of Rs.5,00,000/- (Five Lakh Rupees) with the IRP to meet the initial CIRP cost, if demanded by the IRP to fund initial expenses on issuing public notice and inviting claims, etc. The amount so deposited shall be interim finance and paid back to the FC on priority upon the funds available with IRP/RP. The expenses, incurred by IRP out of this fund, are subject to approval by the Committee of Creditors.
- VIII. A copy of this Order be sent to the Registrar of Companies, Mumbai Maharashtra, for updating the Master Data of the CD.
- IX. Registry is directed to immediately communicate this Order to the FC, the CD and the IRP by way of e-mail and WhatsApp, not later than two days from the date of this Order.
- X. The Registry is directed to communicate this order to the Insolvency and Bankruptcy Board of India forthwith for information and record.
- XI. Compliance report of the order by Designated Registrar is to be submitted today.**

Sd/-
SANJIV DUTT
MEMBER (TECHNICAL)
//Tanmay Jain//

Sd/-
K. R. SAJI KUMAR
MEMBER (JUDICIAL)