**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL**
**MUMBAI BENCH**

CP No. 66/IBC/NCLT/MB/MAH/2018

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

Anchor Leasing Private Limited
….. Financial Creditor

V.

Euro Ceramics Limited.
….. Corporate Debtor

Heard on: 04.02.2019
Pronounced on: 25.02.2019

**Coram :**
Hon'ble M.K. Shrawat, Member (J)

**For the Petitioner :**

Advocate Rohan Rajadhyaksha i/b AZB & Partners.

**For the Respondent :**

Advocate Manaswi Agrawal a/w Advocate Mithila Damle i/b Verus Advocates.

*Per: M.K. Shrawat, Member (J)*

**ORDER**

1. The Petitioner/Applicant viz. 'Anchor Leasing Private Limited' (hereinafter as **Financial Creditor**) 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 **"Financial Creditor"** on 15.01.2018 by invoking the provisions of Section 7 of the Insolvency and Bankruptcy Code (hereinafter as **Code**) against 'Euro Ceramics Limited' (hereinafter as **'Corporate Debtor')**. The registered address of the Corporate Debtor is stated to be 208, Sangam Arcade, Vallabhbhai Road, Opp. Railway Station, Vile Parle (West), Mumbai-400056.
2. In the requisite Form, under the head "Particulars of Financial Debt" the total amount of debt granted is ₹5,00,00,000/- and the total amount claimed to be in default is stated to be ₹10,81,50,936/- (inclusive of principal amount and interest @ 12% quarterly rests) as on 31.12.2017. **The date of default as per Form I is mentioned to be 01.07.2011.**

**A) Brief History of the case:**

3. The Financial Creditor, on 14.10.2009, has granted a loan of ₹5,00,00,000/- @ 12% interest to the Corporate Debtor which is duly disbursed as per the Statement of Account of the Financial Creditor issued by Bank of India annexed in the Petition. The interest was to be paid on a monthly basis but as there was no express agreement to this loan arrangement, the Corporate Debtor used to pay interest in a consolidated manner. **Against this loan, a pledge of 12,44,000 shares of the Corporate Debtor has been made.**
4. The Corporate Debtor paid the interest amount only till July, 2011. Thereafter, there were negotiations going on between the Financial Creditor and the Corporate Debtor. In June, 2013 the **Corporate Debtor issued Cheque No. 849610 of ₹5,00,00,000/- dated 13.06.2013, which was dishonoured on 15.06.2013 with the remark "Fund Insufficient"**. Consequently, the Financial Creditor initiated proceedings under Section 138 of Negotiable Instruments Act, 1881 against the Corporate Debtor and its directors.
5. On 28.10.2013, the Financial Creditor initiated proceedings under Section 15(1) of the Sick Industrial Companies Act, 1985 and the application was pending before Board for Industrial and Financial Reconstruction until 01.12.2016. The Corporate Debtor did not avail the option of moving NCLT u/s 10 of IBC within 180 days of commencement of IBC. An extension was sought by the Corporate Debtor to file section 10 proceedings, but refused.
6. It is also informed that during the pendency of the present proceedings, the Hon'ble Bombay High Court vide Order dated 03.09.2018 in Company Petition No. 540 of 2012 passed a winding up order against the Corporate Debtor and an Official Liquidator was appointed. However, the Order of winding up was recalled vide order dated 02.11.2018. Hence, presently there is no order of winding up against the Corporate Debtor.

**B) <u>Submissions by the Financial Creditor</u>**

7. The Financial Creditor has submitted that the Corporate Debtor has acknowledged its liability in the affidavit in reply to this petition. Moreover, the Corporate Debtor has confirmed the outstanding dues by signing the Statement of Confirmation of Accounts dated 01.04.2010.
8. The Financial Creditor contends that the Corporate debtor acknowledged its liability of ₹5,00,00,000/- in the reply letter dated 13.08.2013 to the notice issued by the Financial creditor for initiation of proceedings under S.138 of Negotiable Instruments Act, 1881. However, the Corporate Debtor raised a defence that because the Financial Creditor failed to exercise the right to sell/dispose the pledged 12,44,000 shares for the recovery of its dues, it cannot recover the money from the Corporate Debtor. The

Corporate Debtor further goes on to say that the cheque was given only as a 'security' and its encashment was wrongful.

9. It is further submitted that a legal notice dated 25.05.2017 was issued by the Financial Creditor calling upon the Corporate Debtor to repay the loan amount along with interest. However, the Corporate Debtor did not reply to the above said notice, neither paid the loan amount.
10. The Petitioner further argues that the petition is complete in all respects, the Corporate Debtor is not making the payment and all the procedural formalities have been complied with, this Petition/Application may be Admitted for the initiation of the CIRP.

**C) <u>Submissions by the Corporate Debtor</u> :**

11. The Corporate Debtor has filed an affidavit in reply and an additional affidavit in reply to this petition. The contention of the corporate Debtor is that the cheque of ₹5,00,00,000/- *supra*, was issued to the Corporate Debtor as a security for the debt. Hence, the encashment of the above said cheque by the Financial Creditor without the authority of the Corporate debtor was wrong and invalid in law. Further, the Corporate Debtor submits that the loan was sanctioned on a pledge of 12,44,000 shares. The Financial Creditor, instead of invoking the pledge or selling/disposing the pledged shares, has initiated multiple legal proceedings against the Corporate Debtor, which is wrong on the part of the Financial Creditor. The Corporate Debtor submits that no dues would have been payable by the Corporate debtor if the Financial creditor had sold the pledged shares and recovered its dues.
12. In the additional affidavit in reply, the Corporate Debtor has raised the issue that the Financial Creditor has failed to file the documents evidencing the debt as per the Bankers Books Evidence Act, 1891. The statement of accounts of the Financial Creditor and the Bank Certificate issued by Bank of India are not accompanied with the Certificate required under Section 2 of the Bankers' Books Evidence Act, 1891. Hence, these documents cannot be relied upon.
13. The Corporate debtor further argues that there is no agreement as regards the existence of the loan amount and the interest thereon. The claim of the Financial Creditor is based on an oral agreement, which is disputed by the Corporate Debtor. The Corporate Debtor supports this contention by placing reliance on the judgement of *Sanjay Kewalramani V. Sunil Parmanand Kewalramani & Ors. [Company Appeal (AT) (Insolvency) No. 57 of 2018], Order dated 02.02.2018* ,where in *inter alia* it was held by the respected NCLAT that merely grant of loan by the Financial Creditor and its admission by the Corporate Debtor in the absence of substantive evidence as 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 IBC. Here, the corporate Debtor says that the Financial Creditor has failed to prove the existence of an agreement as regards the payment of interest on the amount advanced.

**D) <u>Rejoinder by the Financial Creditor:</u>**

14. In response to the Corporate Debtor's contention that the cheque of ₹5,00,00,000/- was given as a security to the debt, the Financial Creditor relies on *Puneet Kumar Agarwal v. M/s Imaginations Agri exports & Ors. [2013 SCC Online Del 701], order Dated 19.02.2013,* which says that even if the cheque was to be treated as a security, the person issuing the blank cheque is authorizing the holder of the cheque to fill up the amount thereon and realize the money due to him. Therefore, this argument of the Corporate Debtor is unsustainable.

15. The Financial Creditor further argues that it is the option of the Financial Creditor to enforce or not enforce the security given against a loan. The Corporate Debtor cannot compel the Financial Creditor to sell the pledged security. The Financial Creditor has placed reliance on a number of judgements to substantiate this contention. In *National Securities Clearing Corporation Ltd. V. Prime Broking Company (India) Ltd. [2016 SCC Online Bom 4501],Order dated 28.06.2016, it was held that:*

> "*Even otherwise, I find that the law as far as Section 176 of the Contract act, 1872 is concerned, is quite well settled. The law, as I understand it, is that a pledger cannot compel a pledgee to exercise the power of sale as a means of discharge or to satisfy the debt. The Pledgor's rights are only (i) in case the pledgee exercised the power of sale, to insist that it should be honestly and properly done and the sale proceeds applied to the debt; (ii) in case the pledgee did not exercise the power of sale, then the pledgor can redeem the pledge on payment of the debt or such part of it that has remained unpaid; and (iii) in case the sale was improperly exercised, to get damages caused thereby."*
>
> Similar view was given by the Hon'ble Madras High Court in the matters of *S.L. Ramaswamy Chetty V. M.S.A.P.L. Palaniappa Chettiar, [AIR 1930 Mad 364]* and *Rani Leasing & Finance Limited V. Sanjay Khemani* [2015 SCC Online Cal 450].

16. The Financial creditor has further substantiated its claim as regards the debt by tendering the judgement of the Hon'ble Supreme Court in the matter of *Innoventive Industries Limited V. ICICI Bank & Anr.[(2018) 1 SCC 407],* wherein *inter alia* it was held that the provisions of Section 7 become applicable as soon as a financial debt is established and there is an existence of default. The Hon'ble court has expressed that the moment the

Adjudicating Authority is satisfied that a default in repayment of debt had occurred , the process of insolvency is to be triggered, unless the application is incomplete.

**E) <u>Findings</u> :**

17. On perusal of the arguments of both the sides and the documents and evidences placed on record, this Bench finds that although there is no express agreement to the loan arrangement as aforesaid 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. Further, the statement of accounts produced on record prove the disbursement of the loan amount of ₹5,00,00,000/- and the Corporate Debtor has even paid interest for the same till 02.07.2011. This argument of the Financial creditor was convincing enough that the loan has been granted for a consideration for the time value of money. 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'. Therefore, this contention of the Corporate Debtor is hereby rejected.

18. As far as the issue of non-filing of account statements as per section 2 of the Bankers' book Evidence Act, 1891 is concerned, I am placing reliance on *Standard Chartered Bank & DBS Bank Ltd. V. Ruchi Soya Industries Ltd. (CP No. 1371 & 1372/IBP/NCLT/MAH/2017)* wherein *inter alia* it was held and I am also of the similar view that quote, 'since the Corporate Debtor's case is that these entries in Bankers Book are not in accordance with the Bankers' Book Evidence Act, it is essential to look into Part V of Form I in respect to Entry 7 of this Part V. In Entry 7, two things are requisite, one is, it must be a copy of entry in a Bankers Book, two, that copy shall be attached with Form No. 1. If we see the definition of "Bankers' Books", statement of account being a record used in the ordinary business of the Bank, it will fall within the definition of Bankers' Book. In Entry No. 7, what is asked to attach is the copy of the Bankers' Book, it has not been asked to file a certified copy as certified under Bankers Book Evidence Act' unquote. Therefore, it can't be said that unless a certified copy is filed, it should not be looked into.

19. Furthermore, the contention of the Corporate Debtor, that the Cheque No. 849610 of ₹5,00,00,000/- dated 13.06.2013 was issued as a security to the Financial Creditor, is also rejected because I am of the conscientious view that for once even if it is believed that it was a security given for the debt, then also, the Corporate Debtor is acknowledging its liability and giving the right to the Financial Creditor to encash the cheque in case of default.

20. As far as invocation of pledge is concerned, throwing light on Section 176 of the Indian Contract act, 1872 would be helpful. Section 176 of the Contract act, 1872 says that:

> *"176. Pawnee's right where pawnor makes default:*
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> *If the pawnor makes default in payment of the debt, or performance, at the stipulated time, of the promise, in respect of which the goods were pledged,* ***the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security****; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale.*
>
> *If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor".*

21. Therefore, the pawnee (Financial Creditor here) has full right to retain the pledged shares as a collateral security, and in the present case, the Financial Creditor has opted for the first option given to him under Section 176 of the Contract Act, 1872. The Corporate Debtor cannot compel the Financial Creditor to recover its dues by invoking the pledge of 12,44,000 shares. The Financial Creditor is free to avail any of the remedy given by law to recover its outstanding dues. Hence, non-enforcement of security given for the debt does not disentitle the Financial Creditor from filing the present petition.

22. Furthermore, Section 7 petition does not leave any scope for the Corporate Debtor to raise a dispute unlike in Section 9. As long as there is a 'Debt' and a 'Default' has occurred, I am consciously inclined to admit the petition after the landmark judgement of the Hon'ble Supreme Court in *Swiss Ribbons Pvt. Ltd. & Ors. V. Union of India & Ors. [Writ Petition (Civil) No. 99 of 2018]*. The defences raised by the Corporate Debtor, in my view, hold no water. All the more, the acknowledgements of the Corporate Debtor to the debt, be it statement of accounts, the statement of confirmation of accounts duly signed by the Corporate Debtor, or the reply to this petition, the Corporate debtor has time and again acknowledged the outstanding dues payable to the Financial creditor. **It is a well known principle of law that,** *quote* **'*Admissions*' are the best proof of the facts admitted. Admissions in pleadings or judicial admissions, made by the parties during the hearing of the case are fully binding on the party that makes them and constitute a *waiver of proof*'** *unquote*. Hence, in the present case, by admitting the liability in affidavit in reply to this

petition, the Corporate Debtor is estopped to prove the non-existence of debt by raising any kind of 'dispute' or defence as the same is all cliché' for deciding the fate of present proceedings. The Petitioner's claim of existence of debt and default has been corroborated with ample evidence and is enough to hold a view in its favour.

23. On going through the facts and submissions of the petitioner and upon considering the same, it is concluded that the Financial Creditor has established that the loan was duly sanctioned and duly disbursed to the Corporate Debtor but there has been default in payment of Debt on the part of the Corporate Debtor.

24. Considering the above facts, I come to conclusion the nature of Debt is a "Financial Debt" as defined under section 5 (8) of the Code. It has also been established that admittedly there is a "Default" as defined under section 3 (12) of the Code on the part of the Debtor.

25. As a consequence, keeping the admitted facts in mind, it is found that the Petitioner has not received the outstanding Debt from the Respondent and that the formalities as prescribed under the Code have been completed by the Petitioner, I am of the conscientious view that this Petition deserves **'Admission'**.

26. Further that, I have also perused the Form – 2 i.e. written consent of the proposed Interim Resolution Professional submitted along with this application/petition by the Financial Creditor and there is nothing on record which proves that any disciplinary action is pending against the said proposed Interim Resolution Professional.

27. Hence, after perusal of the provisions of the Code and facts and circumstances of this case along with the submissions of the petitioner, it is hereby held that this Petition/Application is **Admitted.**

28. The Financial Creditor has proposed the name of Insolvency Professional. The IRP proposed by the Financial Creditor, **Mr. Arun Kapoor**, F-206, Army Co-operative Housing Society, Sector-9, Nerul east, Navi Mumbai-400706, having registration No. IBBI/IPA-003/IP-N00030/2017-18/10230 is hereby appointed as Interim Resolution Professional to conduct the Insolvency Resolution Process.

29. 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 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.

30. 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.

31. 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.

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

33. Ordered Accordingly.

**SD/-**
**M. K. SHRAWAT**
**MEMBER (JUDICIAL)**

**Dated : 25.02.2019**
**js**