

NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH

C.P. (IB) 4404/2019

Under section 7 of the Insolvency and
Bankruptcy Code, 2016

In the matter of

ICICI Bank Ltd.

Registered Office at: ICICI Bank Towers, Bandra
Kurla Complex, Mumbai- 400051, Maharashtra.

Corporate Office at: ICICI Bank Towers, Near
Chakli Circle, Old Padra Road, Vadodara,
Gujarat-390 007.

....Financial Creditor

versus

Mercator Limited

Registered Office at: 83-87, 8th Floor, Mittal
Towers B-wing, Nariman Point, Mumbai-400021.

....Respondent/Corporate Debtor

and

Union of India

Ministry of Corporate Affairs,
Through its Secretary, 100, 5th floor, Everest,
Marine Drive, Mumbai - 400002.

.... Respondent No. 2

Order delivered on: 08.02.2021

Coram:

Hon'ble H. V. Subba Rao, Member (Judicial)

Hon'ble Shyam Babu Gautam, Member (Technical)

Appearance:

For the Financial Creditor: Mr. Rohan Rajadhyaksha a/w.
Mr.Vividh Tandon a/w. Mr. Prakshal Jain and
Kaazvin Kapadia, Advocates i/b Trilegal

For the Corporate Debtor: Mr. Manaswi Agarwal and Mr.
Yash Badkur, Advocates i/b Meraki Chambers.

Per: H. V. Subba Rao, Member (Judicial)

ORDER

1. This Company Petition is filed by ICICI Bank, (hereinafter called “Financial Creditor”) seeking to set in motion the Corporate Insolvency Resolution Process (CIRP) against Mercator Ltd. (hereinafter called “Corporate Debtor”) by invoking the provisions of Section 7 of Insolvency and Bankruptcy Code (hereinafter called “Code”), 2016 alleging that the corporate debtor committed default in making repayment of the loan facility availed by it from the financial creditor.
2. The financial creditor is a body corporate constituted on 05.01.1994 under the Banking Companies (Acquisition and Transfer of Undertaking) Act, 1980 whereas the corporate debtor is a company incorporated on 23.11.1983 bearing CIN L63090MH1983PLC031418 and having nominal share capital of Rs.2,35,00,00,000/- and paid up share capital of Rs.30,24,59,335/-.
3. Mercator Limited, the Corporate Debtor herein, is a company registered under the Companies Act, 1956, having its registered office at the address mentioned in the cause-title above. ICICI bank, the Applicant herein has, from time-to-time, extended to the Corporate Debtor multiple loan facilities of different nature and for different purposes. The Corporate Debtor has currently defaulted on four facilities sanctioned by the Applicant between 2014 to 2016 aggregating to USD 47 million.
4. The present insolvency application is being filed only on the basis of default under two such facilities, extended on 15 December 2016 (Facility III) and 30 December 2016 (Facility IV), aggregating to USD 12 million. Notwithstanding the above, the Applicant expressly reserves its right to avail any remedy available in law to recover amounts due and payable under the other facilities or claim such amount at an appropriate stage before the Interim Resolution Professional/Resolution Professional of the Corporate Debtor, as the case maybe.

5. Facility III

- i. Vide Credit arrangement Letter dated 2 December 2016 (Facility III CAL), the Applicant, at the request of the Corporate debtor, sanctioned term loan facility up to overall limits not exceeding INR 335 million (Rupee equivalent for USD 5 million). A copy of Facility III CAL is annexed herewith as Annexure F.
- ii. Subsequently, on 15 December 2016, by way of Corporate Rupee Loan Facility Agreement entered into between the Applicant and the Corporate Debtor (**Facility III Agreement**), the Applicant, at the request of the Corporate Debtor, agreed to provide the Corporate Debtor a Rupee term loan not exceeding INR equivalent of USD 5 million and a FCNR (B) facility of USD 5 million as a sublimit of the Rupee term loan facility.
- iii. Pursuant to Facility III Agreement, the total amount of USD 5 million was disbursed by the Applicant to the Corporate Debtor in two tranches, on 23 December 2016 and 3 January 2017.

6. Facility IV

- i. Vide Credit Arrangement Letter dated 2 December 2016 (Facility IV CAL), The Applicant, at the request of the Corporate Debtor, sanctioned term loan facility up to overall limits not exceeding INR 469 million (Rupee equivalent for USD 7 million).
- ii. Subsequently, on 30 December 2016, by way of Corporate Rupee Loan Facility Agreement entered into between the Applicant and the Corporate Debtor (Facility IV Agreement), the applicant, at the request of the Corporate Debtor, agreed to provide the Corporate Debtor a Rupee term loan not exceeding INR equivalent of USD 7 million.

7. Both Facility III and IV granted by the Applicant to the Corporate Debtor are secured by way of securities as set out below:

- i. **Mortgage:** The Corporate Debtor executed a Statutory Deed of Mortgage dated 10 March 2017 creating first pari passu charge over the vessels Uma Prem, Darshani Prem and Tridevi Prem ("**Vessels**") in favour of the Applicant. A copy of the said Statutory Deed of Mortgage is annexed herewith as **Annexure K**. The estimated value of the mortgaged securities is USD 3,410,000 (Approximately INR 242,110,000) valued as on 04 June 2019.
 - ii. **Hypothecation:** The Corporate Debtor simultaneously executed an Unattested Deed of Hypothecation dated 10 March 2017 creating first pari passu charge over the cash flows from the Vessels in favour of the Applicant.
8. The Corporate Debtor was irregular in servicing of its debt obligations under Facility III and IV from 28 February 2019 onwards and has continued to default in repayments.
9. As a result of the continuous default on part of the Corporate Debtor, the account of the Corporate Debtor with the Applicant was classified as a Non-Performing Asset with effect from 21 May 2019.
10. Subsequently, as a result of the persistent and continuing defaults in payment of both facilities advanced to the Corporate Debtor, which constituted an event of default under Facility III and Facility IV Agreement, the Applicant issued a notice of recall dated 10 October 2019 to the Corporate Debtor, recalling both Facility III and IV availed by the Corporate Debtor from the Applicant. Hence, the Applicant, vide the Recall Notice declared all amounts under Facility III and IV due and payable and called upon the Corporate Debtor to pay to the Applicant the outstanding principal amount together with interest and other amounts payable under Facility III and IV aggregating to INR 707,251,072, together with further interest, amounts (if any) payable due to fluctuation in currency exchange rate, and other charges thereon, at the contractual rate upon the footing of compound interest until payment realization.

11. In the light of the continuing default by the Corporate Debtor in making payments of the amount owed to the Applicant under Facility III and IV, the Applicant is constrained to initiate the present proceedings in its capacity as a financial creditor of the Corporate Debtor. It is stated that the accompanying Form-I has been filed on account of the financial debt owed by the Corporate Debtor to the Applicant.
12. The applicant submits that the aforesaid clearly demonstrates, 9i) the existence of a debt owed by the Corporate Debtor to the Applicant under the Facility; and (ii) the occurrence of persistent defaults on part of the Corporate Debtor in repayment of such debt.
13. It is submitted that the Corporate Debtor is unable and/or unwilling to pay the Applicant and hence, it is just and equitable that insolvency proceedings be initiated against the Corporate Debtor under the provision of Section 7 of the Code.
14. In view of the above, the Applicant in the interest of an effective resolution of the debt of the Corporate Debtor, has preferred the present Application before this Tribunal to initiate the insolvency resolution process of the Corporate Debtor. This is without prejudice to the Applicant's rights to initiate other proceedings available under law.
15. The respondent Corporate Debtor filed affidavit in reply of Mr. Sagar Patil, the Authorized Representative and additional affidavit in reply of Shalabh Mittal as follows:
 - i. The petitioner is not entitled to any relief in the above petition or otherwise and the petition is filed by the petitioner with malafide intention to hinder and wrongfully avail the assets of other secured creditor of the Corporate Debtor. The respondent CD further contents that the above petition is filed with malicious intent for purpose other than resolution of insolvency of the Corporate Debtor and therefore the same is liable to be dismissed on that ground alone.

- ii. The corporate debtor availed 4 loan facilities aggregating to USD 47 million from the petitioner and had mortgaged 4 (four) vessels owned by the Corporate Debtor in favour of the Applicant to secure the repayment of the said loan facilities. The said four vessels were- (i) Tridevi Prem; (ii) Darshani Prem; (iii) Uma Prem; and (iv) Vivek Prem. The Corporate Debtor due to its financial constraints requested all its lenders (including the Petitioner) for financial assistance towards capital expenditure for maintaining the said vessels including the insurance in respect of the said vessels. However, the Petitioner refused to provide any financial assistance. Pursuant thereto, by a letter dated September 7 2019, the Corporate Debtor informed the Petitioner that the Corporate Debtor did not have sufficient funds to manage the said four vessels and the said vessels ought to be taken charge of by the Petitioner and the Petitioner ought to realize its dues to the extent possible from the said vessels. The petitioner was well informed that the vessels which were charged to the Petitioner were being used or remained idle without any insurance cover and were in a precarious condition. Thus, it was only prudent to have realized the value from the said vessels at the earliest and delaying the same would only lead to depreciation in the value of the vessels. However, the Petitioner failed to take any cogent steps towards it.
- iii. In these circumstances, one of the vessels viz. Tridevi Prem developed a leak and capsized at New Mangalore Port in early September 2019. Darshani Prem, Uma Prem and Vivek Prem have been arrested under the orders of various Courts on account maritime claims of various vendors of the said vessels. This situation could have been avoided if the petitioner had taken charge of the said vessels in time and either funded the capital expenditure for the same or sold the same to recover its outstanding dues. Thus, the petitioner instead of taking active efforts towards protecting and realizing the best value from the assets secured by the

Corporate Debtor in favour of the petitioner, allowed such secured assets to perish and depreciate. The above facts are evident from the minutes of the meeting of the lenders dated June 6, 2019 (annexed at Page No. 129 as part of Exhibit C to the affidavit in reply), email dated September 7, 2019 addressed by the Corporate Debtor to the Applicant (annexed at at Exhibit B to the affidavit in reply) and email dated September 3, 2019 addressed by the Corporate Debtor to the Applicant (annexed at page No. 133 as part of Exhibit C to the affidavit in reply). However, the Corporate Debtor continued to co-operate with the petitioner so that the petitioner could take the said vessels and realise its outstanding dues.

- iv. On December 19, 2019, the Corporate Debtor addressed a letter to the Petitioner and offered to pay an amount of Rs. 38,00,00,000 (Rupees Thirty Eight Crores Only) towards one time settlement of all the outstanding dues of the petitioner owed by the Corporate Debtor. Pertinently, the petitioner, without due consideration to the one time settlement offer made by the Corporate Debtor, addressed a letter dated December 24, 2019 and rejected the said offer without giving any cogent reason.
- v. The respondent contends that the petitioner let the value of its security to depreciate which reduced the security cover of the petitioner's debt. Having failed to realise the security interest in respect of the debt owed by the Corporate Debtor to the Petitioner, the Petitioner filed the above Company Petition to initiate the corporate insolvency resolution process. Further, the Petitioner filed Misc. Application No. 151 of 2020 seeking to prevent the sale of participating rights in an oil block CB-ONN-2005/9 (**CB-9**) situated in Gurjat's Cambay Basin, which asset is owned by Mercator Petroleum Limited (**MPL**), a subsidiary of the Corporate Debtor. Through the Petitioner sought reliefs in respect of CB-9, the Petitioner did not implead MPL in the said Misc. Application.

- vi. The Petitioner in the said Misc. Application alleged that CB-9 was a crucial asset of the Corporate Debtor and alienation of such asset would significantly hamper the chances of the successful resolution of insolvency of the Corporate Debtor, if the above Company Petition was admitted by this Tribunal. This was the entire basis of the said Misc. Application. However, as stated above, the alienation of CB-9 (or prevention thereof) would have no impact on the Corporate Insolvency Resolution Process of the Corporate Debtor as CB-9 is not an asset of the Corporate Debtor. Further, the respondent contends that the petitioner filed the said Misc. Application seeking interim reliefs in the above Company petition which is filed to initiate the Corporate Insolvency Resolution Process in respect of the Corporate Debtor. However, it is pertinent to note that the petitioner has sought reliefs in respect of assets of MPL, which reliefs have no nexus to the relief in the above Company petition.
- vii. Thus, it is evident from the foregoing paragraph that the petitioner has not only failed to take any steps to protect and prevent the depreciation of its secured assets but also failed to realize the best value therefrom. Instead, having allowed its own securities to devalue and depreciate, the Petitioner is now blocking the realization of the securities of the other lenders. Notably, other secured financial creditors of the Corporate Debtor have taken due steps to recover their outstanding dues from their respective securities and the Corporate Debtor has been cooperating with all such creditors. However, the Petitioner is attempting to block the recovery of other creditor by pushing the Corporate Debtor into corporate insolvency resolution process only to avail the assets secured to other creditors to recover its outstanding dues.
- viii. In the above circumstances, the Corporate Debtor in order to reduce to debt towards the Petitioner sold its vessel 'Sisouli Prem' being a VLGC (Very Large Gas Carrier) in December

2018 and discharged liability of accrued interest and payment of ECB of USD 5 million in full and partial instalments due in September 2018. Thus, the Corporate Debtor made best attempts to repay the outstanding dues of the Petitioner from the assets which were provided to the Petitioner as security to repay the financial facilities availed from the petitioner.

- ix. In view of the Petitioner deliberately dragging its feet to monetise the dredgers charged to the Petitioner and the continued deterioration in the condition of the said dredgers, the Corporate Debtor vide an email dated September 7, 2019 requested the Petitioner to take over the charge of the said three dredgers and recover the outstanding dues of the petitioner from the sale of such dredgers. Despite the email dated September 7, 2019, the Petitioner neither suitably responded to the Corporate Debtor nor took any effective steps to monetise Darshani Prem and Uma Prem. Consequently, Uma Prem was arrested by the Hon'ble Bombay High Court vide its order dated September 11, 2019 in Commercial Admiralty Suit (Lodging) No. 61 of 2019. Further, Darshani Prem was arrested by the Hon'ble High Court of Andhra Pradesh in vide an Order dated May 20, 2019 passed in C.S. No. 2 of 2019. The fact that the petitioner failed to take timely steps to monetize its secured assets despite the Corporate Debtor's continued prodding of the Petitioner in respect of the same is also evident from the conversation between the representatives of the Petitioner and the Corporate Debtor over whatsapp.
- x. The respondent contends that the petitioner has (i) failed to take any effective steps to sell its secured assets to recover its outstanding dues; (ii) permitted its secured assets to devalue; and (iii) allowed the liabilities to mount on the Corporate Debtor through such secured assets. Now, by the above petition and Misc. Application No. 151 of 2020, the Petitioner is seeking (a) to restrain other secured creditors

from enforcing their security interest; (b) to restrain the sale of assets of MPL when the Petitioner has no right in such assets whatsoever; and (c) thus, further devalue the assets of the Corporate Debtor and its subsidiaries.

16. The Respondent sought for dismissal of the above company petition on the ground stated above.

17. The respondent is resisting the admission of the company petition mainly on the following grounds:

- i. That financial creditor has failed to discharge its obligation as a lender in protecting the security interest of the mortgaged dredgers and therefore the above company petition is liable to be dismissed.
- ii. The petitioner has not disclosed the facts of capsizing of dredger, Tridevi Prem and suppressed the said information in the petition and therefore the is liable to be dismissed under Section 75 of IBC.

18. Heard Mr. Rohan Rajadhyaksha, learned counsel appearing for the financial creditor and Ms. Manaswi Agrawal, learned counsel for the corporate debtor and perused the records. The learned counsel appearing for the financial creditor submitted his arguments in the light of his pleadings in the main company petition. The petitioner's counsel submits that the corporate debtor in the present case has not denied the existence of debt and default which are the only relevant factors to be considered by this tribunal in admitting the company petition filed under section 7 of the code as per the law laid down by the Hon'ble Apex Court in the case of **Mardia Chemicals Vs. Union of India**. In order to prove the existence of the debt and default, he invited the attention of this tribunal to pages 285 to 287 under Annexure 'J' in which the details of disbursement of the debt and default of each financial facility provided by the financial creditor are clearly mentioned. The counsel appearing for the petitioner also invited the attention of this tribunal to clause 8 of the deed of mortgage entered into

between the financial creditor and the corporate debtor in which the corporate debtor undertook to maintain each vessel financed by the financial creditor in a seaworthy condition under the deed and argued that it is the duty of the corporate debtor to maintain the vessel seaworthy.

19. He also relied upon various minutes and the correspondence annexed to the additional affidavit in reply dated 12.02.2020 filed by Corporate Debtor. It is the submission of Mr. Rohan Rajadhyaksha that lenders in principal agreed to take the proposal expeditiously for approval of the sale of the dredgers in their minutes of meeting dated 3.06.2019 and also invited the attention of this tribunal to the letter dated 20.06.2019 addressed by the financial creditor to the corporate debtor intimating that the financial creditor has received approval for sale of the three dredgers namely Uma Prem, Darshani Prem and Tridevi Prem and requested the corporate debtor to intimate the maritime liens on the said dredgers such as pending crew wages and port dues etc.
20. He also invited the attention of this tribunal to the email dated 08.08.2019 sent by the bank to the corporate debtor intimating about receipt of 3 quotations for the 3 dredgers and requested the corporate debtor to share the maritime liabilities on the said dredgers. Thus, it is the submission of the counsel appearing for the financial creditor that the subject matter of the dredgers could not be disposed of due to the non-cooperation of corporate debtor and not on account of any delay on the part of the financial creditor.
21. The petitioner submits that the subject matter of the vessels could not be disposed of due to the dues accumulated on the vessels due to mis-management on the part of the Corporate Debtor and the applicant would not be able to recover any substantial amounts even after giving up its status as a secured creditor of the Corporate Debtor. The petitioner further submits that the lenders liability as defined and discussed in *Mardia Chemical Vs. Union of India* is while deciding the liability of lenders under the SURFAESI Act which is a recovery legislation for lenders to recover their dues

unlike the IBC which is a beneficial legislation designed for the Resolution of the Corporate Debtor.

22. The second contentions with regard to not disclosing the facts of capsizing of the dredger, Tridevi Prem in the petition is concerned, as rightly contended by the petitioner, the above plea was raised by the respondent after completion of rejoinder arguments by the counsel for the applicant. Even otherwise section 7 application can be filed by Financial Creditor by merely submitting application in the prescribed format under the prescribed Code unlike a detailed plaint in a civil suit and therefore, there is no merit in the above contention also.
23. After hearing the arguments on both sides, this tribunal is convinced that there is a force in the submissions made by the petitioner with regard to the relevant factors to be looked into by the Adjudicating Authority in admitting the company petition. As rightly contended by the petitioner the Adjudicating Authority has to merely look into the existence of debt and default for admitting a Company Petition under Section 7 of the code as per law laid down by Hon'ble Supreme Court in various judgments. When once the debt and default is proved the company petition has to be admitted. Even otherwise the petitioner successfully demonstrated before this Tribunal that the subject matter of the vessels could not be disposed of by the financial creditor on account of their own mishandling of the financial affairs of the corporate debtor accumulating the losses and maritime liens on the vessels.
24. Mr. Rohan Rajadhyaksha also fairly conceded that the financial creditor has no objection for excluding the sale proceeds of the vessel 'MT' Premmala presently lying with the Bombay High Court in the pending appeal filed by State Bank of India from the purview of the CIRP process of this Company Petition.
25. For the reasons stated above there are no merits in any of the contentions raised by the Corporate Debtor as they are beyond the scope of Section 7 of the Code. Therefore, the above company petition is liable to be admitted. Accordingly, we passed the following:

ORDER

- (a) The above Company Petition No. (IB) -4404(MB)/2019 is hereby admitted and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against M/s Mercator Limited.
- (b) This Bench hereby appoints **Mr. Girish Siriram Juneja** Insolvency Professional, Registration No: IBBI/IPA-001/IP-P00999/2017-2018/11646 having office at 22, Dignity Apartments, Bon Bon Lane, 7 Bungalows, Versova, Andheri (W), Mumbai 400053 as the Interim Resolution Professional to carry out the functions as mentioned under the Insolvency & Bankruptcy Code.
- (c) The Financial Creditor shall deposit an amount of Rs.5 Lakh towards the initial CIRP cost by way of a Demand Draft drawn in favour of the Interim Resolution Professional appointed herein, immediately upon communication of this Order.
- (d) That this Bench hereby prohibits 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; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; 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; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.
- (e) The sale proceeds of the vessel 'MT' Premmala presently lying with the Bombay High Court in the pending appeal filed by State Bank of India are excluded from the purview of the CIRP process of this Company Petition.

- (f) That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- (g) That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- (h) That the order of moratorium shall have effect from the date of pronouncement of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.
- (i) That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
- (j) During the CIRP period, the management of the corporate debtor will vest in the IRP/RP. The suspended directors and employees of the corporate debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.
- (k) Registry shall send a copy of this order to the Registrar of Companies, Mumbai, for updating the Master Data of the Corporate Debtor.

Accordingly, this Petition is allowed.

The Registry is hereby directed to communicate this order to both the parties and to IRP immediately.

In view of the above final order, the Interlocutory application bearing no. 2413/2020 stands disposed of.

Sd/-
SHYAM BABU GAUTAM
Member (Technical)

Sd/-
H. V. SUBBA RAO
Member (Judicial)