
Volkswagen Finance Pvt. Ltd Vs Ten Travels Private Limited

(IB) No. 2085(ND) Of 2019

Court: National Company Law Tribunal New Delhi Bench

Date of Decision: March 19, 2020

Acts Referred:

Insolvency And Bankruptcy (Application To Adjudicating Authority) Rules, 2016 " Rule 4, 4(3)#Insolvency And Bankruptcy Code, 2016 " Section 7, 7(1), 7(2), 7(5), 7(7), 8, 8(1), 8(2), 9, 14, 15, 17, 18, 31(1), 33

Hon'ble Judges: Abni Ranjan Kumar Sinha, J; Kapal Kumar Vohra, Member (Technical)

Bench: Division Bench

Advocate: Nazia Parveen, Ashish Chaudhary, Dhruv

Judgement

Abni Ranjan Kumar Sinha, J

1. The present petition has been filed under Section 7 of the Insolvency & Bankruptcy Code, 2016, (hereinafter referred to as the ""Code""), praying for

initiation of Corporate Insolvency Resolution Process of the Corporate Debtor on grounds of its inability to liquidate its financial debt.

2. As per averments made in the petition, the Corporate Debtor had availed financial facility from the Financial Creditor on 30.06.2017, thereafter

committed default in repayment and therefore Corporate Debtor's account had become NPA. The Corporate Debtor approached for loan and the

Financial Creditor after considering its application, sanctioned the Four Car Loan of Rs. 1,10,89,800/- to the Corporate Debtor. The Directors of the

Corporate Debtor Mr. Joginder Solanki, Rashmee and Mr. Satish Sehrawat furnished Guarantee dated 30th June, 2017. The Corporate Debtor failed

to repay the amount as per the repayment schedule and account of the Corporate Debtor was recalled by the Financial Creditor by issuance of

demand notice.

3. Pursuant to the Court notice issued to the Corporate Debtor, reply-was filed and it was submitted by Corporate Debtor that:-

a. The present application has been filed by the Volkswagen Finance Pvt. Ltd. through its alleged authorized representative namely Kapil Matta. It is

submitted that Kapil Matta has no proper and valid authority to present the Section 7 application before this Hon'ble Tribunal and as such the Section 7

application is bad in law and is liable to be dismissed on this ground alone.

b. The Board Resolution authorizing Mr. Ripudaman Singh, Head-Operations, Collection Legal to issue Power of Attorney in favour of employees of

the Company for the purpose of initiating any legal proceedings, arbitration proceedings is dated 29.05.2019, thus Mr. Ripudaman Singh, Head-

Operations, Collection Legal had authority to issue Power of Attorney only after 29.05.2019. However, it is submitted that Mr. Ripudaman Singh,

Head-Operations, Collection Legal has issued a Power of Attorney in favour of Mr. Kapil Matta on 14.02.2019 on the basis of which the present

Section 7 has been filed on 14.02.2019 itself. Thus, it is submitted that Mr. Ripudaman Singh, Head-Operations, Collection Legal had no authority to

issue any Power of Attorney in favour of employee of the Company before 29.05.2019 and the Power of Attorney issued in favour of Kapil Matta on

14.02.2019 is baseless and bad in law.

c. The alleged authorized representative namely Kapil Matta has only been given general power to initiate legal proceedings and no specific

authorization has been given to the alleged authorized representative to initiate CIRP process under the Code and without any specific authorization

the present Section 7 could not have been filed and is not maintainable in law.

d. That no default has been committed by the Respondent within the meaning of provisions of Insolvency and Bankruptcy Code, 2016 and as such the

Section 7 application filed by the Financial Creditor is liable to be dismissed. That the amount borrowed by the Respondent does not come within the

meaning of "Financial Debt".

e. That the Financial Creditor granted Rs. 4,43,58,200 (Rupees Four Crore Forty Three Lakhs Fifty Nine Thousand Two Hundred Only) to the

Respondent for the purpose of purchasing 4 buses of Scania Commercial Vehicles Pvt. Ltd. It is pertinent to mention here that the Scania Commercial

Vehicles Pvt. Ltd. is a group company of the alleged Financial Creditor.

f. That the arrangement between the parties was such that Scania Commercial Vehicles Pvt. Ltd. will provide all the requisite services, parts,

products of its buses to the Respondent and shall assist the Respondent in all ways possible to maintain the quality, condition, fitness and performance

of the buses. In failure of the Scania Commercial Vehicles Pvt. Ltd. adhering to its promise and any loss being suffered by the Respondent in result

thereof then the Financial Creditor shall be liable to recover the dues to the extent of the loss caused from Scania Commercial Vehicles Pvt. Ltd.

being its own group company.

g. That admittedly Scania Commercial Vehicles Pvt. Ltd. could not live upto its promise in providing quality service, spare parts to maintain the quality,

condition and fitness of the buses and as such the Respondent suffered huge losses because of this negligent act of Scania Commercial Vehicles Pvt.

Ltd. In as much as Scania Commercial Vehicles Pvt. Ltd. has to even close down its entire operation in India. Thus, it is submitted that in terms of

arrangement between the parties the Financial Creditor is liable to realize its dues from Scania Commercial Vehicles Pvt. Ltd. and not the

Respondent.

4. We have heard the Learned Counsel appearing for the applicant and respondent and perused the averments made in the application, rejoinder and

written submissions filed on behalf of the respective parties.

5. Learned Counsel appearing for the Applicant, in course of his arguments, submitted that on 30th June, 2017, the Corporate Debtor had approached

with the applicant for the loan and same has been disbursed for purchase for car loan of Rs. 10,89,800/-. He further submitted that the Directors of

the Corporate Debtor Mr. Joginder Solanki, Ms. Rashmee and Mr. Satish Sehrawat stood guarantor and the guarantee deed dated 30th June 2017. He

further submitted that the Corporate Debtor failed to repay the amount as per the repayment schedule. He further submitted that thereafter by sending

the demand notice dated 20th July, 2019 the applicant recalled the loan account and demanded the outstanding of Rs. 3,46,77,512.08/- which includes

the principal amount, interest and penal interest.

6. On the other hand, Learned Counsel for the Respondent submitted that application filed by the applicant is not maintainable because the power of

attorney holder is not entitled to file Section 7 application. He further submitted that Hon'ble NCLAT in the case of Palogix Infrastructure Private

Limited v ICICI Bank Limited Company Appeal (AT) (Insol.) No. 30/2017 held that power of attorney holder is not competent to file an application

on behalf of the Financial Creditor or Operational Creditor or Corporate Debtor. He further submitted that notification dated 27th February, 2019

issued by the Ministry of Corporate Affairs states that Section 7 can be filed on behalf of the Financial Creditor by Person duly authorized by the

Board of Directors of the Company and here in case, there is no specific authorization to file Section 7 application. Therefore, the authorization to Mr.

Kapil Matta in itself is defective and on this ground alone, the application is liable to be dismissed. He further submitted that no date of default is

mentioned in the application, therefore, there is no default, rather the application is pre-matured.

7. He further submitted that as per the terms of agreement, the applicant was required to serve the notice, therefore, the present application is pre-

matured. He further submitted that there is no default by the Respondent in terms of the IBC, 2016.

8. In reply, the Ld. Counsel appearing for the applicant submitted that the authorized representative was working as Area Collection Manager,

Delhi/NCR and, in that capacity, he was authorized to act in the manner and on behalf of the Company, therefore, the decision upon which the

Respondent placed reliance is not applicable because in that decision also Hon'ble NCLAT held that if Senior Manager of Bank has been authorized

to grant loan for recovery of loan or to initiate the proceedings for CIRP against the person, who have taken loan. In that case, the Corporate Debtor

cannot plead that the officer have power to sanction loan but such officer has no power to recover the amount.

9. Now in the light of the submissions raised on behalf of the parties, when we have gone through the averments made in the application, reply and the

documents enclosed with the application then we find, by filing the reply the respondent has not denied that the amount has not been given to him nor

he has produced any document to show that the said amount has been paid by the respondent to the applicant. The only question which the respondent

raised is that the person who filed the application is not competent to file it and the second objection is that there is no default because the

arrangement between the parties was such that Scania Commercial Vehicles Pvt. Ltd. will provide all the requisite services, parts, products of its

buses to the Respondent and shall assist the Respondent in all ways possible to maintain the quality, condition, fitness and performance of the buses. In

failure of the Scania Commercial Vehicles Pvt. Ltd. adhering to its promise and any loss being suffered by the Respondent in result thereof then the

Financial Creditor shall be liable to recover the dues to the extent of the loss caused from Scania Commercial Vehicles Pvt. Ltd. being its own group

company.

10. Admittedly, Scania Commercial Vehicles Pvt. Ltd. could not live upto its promise in providing quality service, spare parts to maintain the quality,

condition and fitness of the buses (Page 21 of the Reply to Company Petition) and as such the Respondent suffered huge losses because of this

negligent act of Scania Commercial Vehicles Pvt. Ltd. (Page 18 and 23 to 27 of the Reply to Company Petition). In as much as Scania Commercial

Vehicles Pvt. Ltd. had to even close down its entire operation in India.

11. Therefore, at this juncture, we would like to refer the decision of Supreme Court in Innoventive Industries Limited Vs. ICICI Bank reported in

2018 (1) SCC 407 and the relevant portion of the decision is quote below:

28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in

respect of a financial debt owed to any financial creditor of the corporate debtor - it need not be a debt owed to the applicant financial creditor. Under

Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and

Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied

by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the

corporate debtor in Part II, particulars of the proposed interim resolution professional in part III, particulars of the financial debt in part IV and

documents, records and evidence of default in part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating

authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to

ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is

important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be

satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which

may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is

satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify

the defect within 7 days of receipt of a notice from the adjudicating authority. Under subsection (7), the adjudicating authority shall then communicate

the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.

29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to

first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the

corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in subsection (1), bring to the notice

of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing -i.e.

before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out

of the clutches of the Code.

30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has

merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is

of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense

that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may

reject an application and not otherwise".

12. At this juncture, we would also like to refer Section 7 and the same is quoted below:

7. Initiation of corporate insolvency resolution process by financial creditor- (1) A financial creditor either by itself or jointly with other financial

creditors may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority

when a default has occurred.

Explanation.--For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial

creditor but to any other financial creditor of the corporate debtor.

(2) The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be

prescribed.

(3) The financial creditor shall, along with the application furnish--

(a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;

(b) the name of the resolution professional proposed to act as an interim resolution professional; and

(c) any other information as may be specified by the Board.

(4) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default

from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3).

Provided that if the Adjudicating Authority has not ascertained the existence of default and passed an order under sub-section (5) within such time, it

shall record its reasons in writing for the same.

(5) Where the Adjudicating Authority is satisfied that--

(a) a default has occurred and the application under subsection (2) is complete, and there is no disciplinary proceedings pending against the proposed

resolution professional, it may, by order, admit such application; or

(b) default has not occurred or the application under subsection (2) is incomplete or any disciplinary proceeding is pending against the proposed

resolution professional, it may, by order, reject such application:

Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to

rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5).

(7) The Adjudicating Authority shall communicate--

(a) the order under clause (a) of sub-section (5) to the financial creditor and the corporate debtor;

(b) the order under clause (b) of sub-section (5) to the financial creditor, within seven days of admission or rejection of such application, as the case

may be.

13. Mere plain reading of the provision and decision shows that to trigger Section 7, the application is required to establish that there is a financial debt

and there is a default in respect of that financial debt. Like Section 8 and 9 of the IBC, 2016, while considering the application under Section 7, the

Adjudicating Authority is not required to consider the question of dispute. The question of dispute is outside the jurisdiction of Section 7. The only point

is that the Adjudicating Authority is required to consider is that whether there is financial debt or that debt has been paid or not.

14. In the light of the aforesaid facts, when we shall consider the case in hand then we find, here in the case in hand, the disbursement of the loan

amount is not denied by the Respondent rather the respondent by filing the reply in Para-10 admits this fact that Financial Creditor granted Rs.

4,43,50,200/- for the purpose of purchasing 4 buses. The only question, which respondent raised in his reply in Para-13 that the respondent time and

again raised various disputes with Scania Commercial Vehicles Pvt. Ltd. with regard to the quality of the buses provided. Therefore, we find that

although the respondent admits the loan as well as non-payment of loan but try to take a defense that he raised the dispute.

15. As we have already discussed the decision and the provision of Section 7 and on the basis of that, we are of the considered view that the dispute

is outside the ambit of Section 7 of the IBC, 2016. Since, the disbursement of loan amount is admitted, non-payment is admitted, therefore, there is a

default in making payment of the loan. At this juncture, we would like to refer that the submissions raised on behalf of the Learned Lawyer appeared

for the respondent that no specific date of default is mentioned.

16. In the light of that, when we have gone through the column 2 of the application then we find that in column 2, he mentioned the amount due on

19th July, 2019 and the Learned Counsel, in course of his argument referred the demand notice dated 20th July, 2019 by which he claimed that amount

and on the basis of that, he claimed that date of default is 19th July, 2019 and thereafter he sent the demand notice on 20th July 2019.

17. For the reasons discussed above, we are unable to accept the contention of the Respondent that since no date of default is mentioned in the

application, therefore, the present application is not maintainable.

18. Now coming to the point, whether on the basis of the document enclosed as Annexure A at page 17 of the application, Mr. Kapil Matta will be

treated as authorized representative or not. Since the respondent has raised this issue, therefore, we have gone through this document as well as

decision upon which the respondent placed reliance and on careful consideration of the same, we find, of course the heading of the document is power

of attorney but at page 2, it is specifically mentioned that the delegated authority of the Board of Directors of the Company Mr. Ripudaman Singh Gill,

Head-Operations, Collections and Legal appointed Mr. Kapil Matta, Employee Code- 90665 working as Area Collection Manager, Delhi/NCR to act

in the name and on behalf of the Company in order to enable him to discharge his duties and to exercise powers and authorities in the name of and on

behalf of the company in the manner and to the extent hereinafter specified. And we further find, he is authorized to become a party to any suit,

petition or any other proceedings and also to institute, prosecute, defend any suit petition, complaint or any other proceedings.

19. Therefore, in our opinion, only on the ground that the heading of the document is Power of Attorney, we cannot disqualify Mr. Kapil Matta to act

in the name of and on behalf of the Company. Hence, the decision upon which the respondent placed reliance under the facts and circumstances of

the case in hand is not applicable. Accordingly, we find, no force in the contention raised on behalf of the Learned Lawyer appearing on behalf of the

respondent that the application is not properly filed by the authorized person.

20. As we have already held that there is a financial debt and there is a default in payment of the debt, and these are the two elements, which required

to be established by the Financial Creditor in order to trigger the proceedings under Section 7 of the IBC, 2016 and the name of the IRP has also been

given which is at page 10 and the written communication of the IRP is also at page 22 as Annexure-D. Therefore, we have no option but to admit the

application, accordingly, this petition is admitted. A moratorium in terms of Section 14 of the IBC, 2016 shall come into effect forthwith staying:-

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or

order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debt or 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 corporate debtor in respect of its property including any action

under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during

moratorium period.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any

financial sector regulator. (4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency

resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan

under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect

from the date of such approval or liquidation order, as the case may be.

21. The Financial Creditor has proposed the name of Mr. Kamal Agarwal as the IRP. His details are as registration No. IBBI/IPA-001/IP-

P00868/2017-18/11466, email:advocate.kamal.aggl@gmail.com. The consent of the Mr. Kamal Agarwal is on record along with the copy of his

certificate and no disciplinary proceedings are pending against him. We accordingly confirm his appointment as the IRP. He shall take such other and

further steps as are required under the statute, more specifically in terms of Section 15, 17 and 18 of the Code and file his report.

22. The Financial Creditor is directed to deposit a sum of Rs. 2 lakhs to meet the immediate expenses of IRP. The same shall be fully accountable by

the IRP and shall be reimbursed by the CoC, to the Financial Creditor to be recovered as CIR costs.

23. Copy of the order be sent to both the parties as well as to the IRP.