IN THE NATIONAL COMPANY LAW TRIBUNAL,

MUMBAI BENCH, COURT- II

INTERVENTION PETITION No. 26 OF 2024

IN

C.P. (IB) - 686 (MB)/2023

IN THE MATTER OF

Bank of Baroda

… Financial Creditor

V/s

Arch Pharmalabs Limited.

…Corporate Debtor

AND

JM Financial Asset Reconstruction Company Limited,

…Intervener/ Applicant

Order delivered: - 15.05.2024

Coram:

Anil Raj Chellan	**Kuldip Kumar Kareer**
Hon'ble Member (Technical)	**Hon'ble Member (Judicial)**

Appearances

For the Applicant **:** Ld. Senior Counsel, Mr. Prateek Seksaria a/w Kalyani Wagle

ORDER

Per: Coram

1. The present Intervention Petition no. 26 of 2024 has been filed by JM Financial Asset Reconstruction Company Limited ("JMFARC") under Section 60(5) of IBC, 2016 read with Rule 11 of NCLT Rules, 2016 seeking, *inter-alia,* following reliefs:

   - To allow this Intervention Application and permit the Intervener/ Applicant to intervene in the captioned Company Petition numbered as C.P. (IB)- 686 (MB)/2023 as a necessary party;
   - Present Intervener/ Applicant be heard before any order is passed in the captioned Company Petition numbered as C.P. (IB)- 686 (MB)/2023;

2. The Applicant submits that the Intervener/ Applicant is one of the financial creditors to the Corporate Debtor wherein the credit exposure is exceeding Rs. 9500 crores.

3. The Financial Creditor i.e. Bank of Baroda, has filed the present Company Petition for initiating corporate insolvency resolution process ("CIRP") against the Corporate Debtor.

4. The Corporate Debtor was granted various financial aids, including term loans and working capital facilities from the Financial Creditor and 49 other lenders under various loan and security documents. In the year 2013, the loan accounts of the Corporate Debtor were classified as Non- Performing Assets by the **aforesaid** lenders. Responding to the Corporate Debtor's initiative to enhance its operations, a corporate debt restructuring package ("CDR") was proposed in 2013 and was given effect to vide the Master Restructuring Agreement dated December 27, 2013 ("MRA"). However, the aforesaid restructuring failed.

5. Thereafter, the Intervener/ Applicant, acting in its capacity as trustee of various trusts, acquired the financial assets of the Corporate Debtor from 40 lenders representing about 97% debt of the Corporate Debtor, together with all the underlying security interest and all rights, titles and interests therein by way of executing various assignment agreements. Subsequently, the debt of the Corporate Debtor was restructured by the Intervener/ Applicant vide the Restructuring Agreement dated December 4, 2017 ("Restructuring Agreement").

6. Accordingly, the dues of the Corporate Debtor were restructured at Rs. 1400 crores vide the said Restructuring Agreement. Further, the Intervener/

Applicant acting in its capacity as lender also granted additional facility of Rs. 200 crores twice vide Additional Facility Agreements dated December 4, 2017 and May 27, 2021. By virtue of the above, the Intervener/ Applicant holds 100% of first charge and 100% of second charge on the secured assets of the Corporate Debtor.

7. The Applicant submits that they have an exposure of over Rs. 9500 crores in the Corporate Debtor, whereas the claim of Bank of Baroda is miniscule as compared to the Intervener/ Applicant herein. Moreover, Bank of Baroda is only an unsecured creditor for the majority of its debt and is a subservient charge holder for a small portion of its debt; whereas, the Intervener/ Applicant, being the 100% first charge and second charge holder on the secured assets of the Corporate Debtor, will be adversely affected, in case orders are passed in the present Company Petition without the Intervener/ Applicant being heard.

8. The Applicant submits that the Corporate Debtor specializes in manufacturing and sale of Intermediates and APIs, operating as one of the India's leading standalone API Companies. With a focus on high growth, complex chemistry and superior margin therapies, it maintains 7 manufacturing units spread across Maharashtra, Telangana and Haryana. The Company's supplies are to its customers in the United States and European Union employing over 1000 employees. The Corporate Debtor is

currently expanding its order book from local and export sales to benefit all stakeholders.

9. The Corporate Debtor has a large manufacturing set up with a potential to maximize its capacity. Further, the Corporate Debtor is into manufacturing of various life-saving drugs which are used locally and globally. Thus, passing of any orders by the Adjudicating Authority, without the Intervener/ Applicant being heard, would put the huge efforts made by the Intervener/ Applicant into jeopardy.

10. The Applicant, being the major financial creditor, has assessed the viability of the Corporate Debtor and rendered support in order continue to its business operations and to ensure successful recovery from the business of the Corporate Debtor. In case orders are passed in the present Company Petition, without the Intervener/ Applicant being heard, it shall jeopardize the efforts taken by the Intervener/ Applicant to revive the Corporate Debtor and the same shall have extremely negative impact on the business operations of the Corporate Debtor.

11. The Applicant submits that the Intervener/ Applicant is the largest financial creditor of the Corporate Debtor having about 97% exposure in the debt of the Corporate Debtor. Accordingly, the Intervener/ Applicant is entitled to be heard before any order of admission of the Corporate Debtor into CIRP is passed by the Adjudicating Authority, as the same will have an immediate

and direct impact on the efforts of the Intervener/ Applicant to revive the operations of the Corporate Debtor.

12. The Intervener/ Applicant, thus, states that it will be the most affected party if any order for admission of the Corporate Debtor into CIRP is passed in the captioned Company Petition without the Intervener/ Applicant being heard. Hence, in the interest of justice, equity and good conscience, the Intervener/ Applicant is praying for an opportunity of being heard in the said Company Petition.

Reply by Corporate Debtor:–

13. The Corporate Debtor submits that the primary objective of restructuring the Corporate Debtor's debt is to put the company back on its feet and ensure its continued business operations. As on date, the restructuring process has been completed, as is being the implemented with support of JMFARC.

14. The Corporate Debtor submits that the Financial Creditor would, at best, has share amounting to not more than 2% of the overall debt, totalling Rs. 134.99 crores, whereas JMFARSC's total claimed debt exceeds 9,500 crores.

15. The Corporate Debtor submits that even if the Company Petition is admitted, it is highly likely that the corporate insolvency resolution process (CIRP) would be withdrawn, as JMFARC with a vote share greater than 90%, would support the petition's withdrawal. Consequently, admitting the present Company Petition would be a useless/empty formality, as ultimately it would be withdrawn upon the constitution of the CoC.

16. The Corporate Debtor submits that the Financial Creditor is an unsecured creditor with a small portion secured by a subservient charge. However, JMFARC holds a 100% first charge and a 100% second charge on the secured assets of the Corporate Debtor. Therefore, even if the Corporate Debtor is subjected to the corporate insolvency resolution process/liquidation process, the Financial creditor will not be able to recover its debts, considering the superiority of JMFARC's secured debt and their share in debt.

17. The Corporate Debtor puts forth the judgment of the Hon'ble Supreme Court of India in **Vidharba Industries Power Limited v/s Axis Bank Limited (citation:)**, in which it was held that it is not necessary for an Adjudicating Authority to admit a Petition filed under Section 7 of the Insolvency and Bankruptcy Code, 2016, even if it is found that there was an existence of debt and default in repayment of such debt. Further, it has been observed that the Adjudicating Authority is empowered to exercise its discretion as provided in Section 7(5)(a) of the code, as the Legislature has used the expression **"may"** in the provision.

18. The Corporate Debtor submits that the initiation of a CIRP will not revive the Company but will disrupt its business operations and the entire purpose for which the present petition has been initiated will be far from achievable.

Reply by the Financial Creditor in brief :–

19. The Financial Creditor has not filed its reply but has been orally heard through its counsel. The contentions advanced by the learned Counsel for the Financial Creditor are summarised hereinbelow:

20. The Financial Creditor submits that the Intervention Petition is not maintainable, as the precedents cited by the Financial Creditor assert that an Intervention Petition at the stage of admitting a Section 7 petition is unnecessary. Consequently, JMARC has no right to be heard in the above-captioned Company Petition.

21. The Financial Creditor asserts that in this case the criteria for establishing the presence of both "Debt" and "Default," along with the acknowledgment from the Corporate Debtor regarding the debt, default, and indebtedness towards the Financial Creditor is established.

22. The Petitioner argues that the Intervention Application should be dismissed as non-maintainable by citing various judgments from the Hon'ble Supreme Court and Hon'ble NCLAT which are as under: -

- Company Appeal (AT) (Insolvency) No.44 of 2018 - DEB Kumar Majumdar & Ors. versus State Bank of India
- Company Appeal (AT) (Insolvency) No.51 of 2019 - IDBI Bank Ltd. v Odisha Slurry Pipeline Infrastructure Ltd

- Company Appeal (AT) (Insolvency) No.676 of 2019 - L&T Infrastructure Finance Company Ltd. versus Gwalior Bypass Project Ltd.
- Company Appeal (AT) (Insolvency) No.436-437 of 2019 - Damont Developers Pvt. Ltd. versus Bank of Baroda & Anr.
- Company Appeal (AT) (Insolvency) No.113 of 2021 - Vekas Kumar Garg versus DMI Finance Pvt. Ltd. & Anr.

These Judgments emphasize that, at the stage of admission of a petition under Section 7 or 9, only the Corporate Debtor and the Financial Creditor are necessary parties to be heard. Third Parties, including intervenors, have no right to be heard at this stage.

23. The Financial Creditor submits that the Intervenor seeks support for their Intervention Application (IA) from a judgment by the Hon'ble NCLAT in CFM Asset Reconstruction Pvt. Ltd. versus Saudi Basic Industries Corporation Ltd & Anr. However, it is pertinent that the said judgment was passed on case specific facts and the same is not applicable in the present matter.

24. Furthermore, the Intervenor cites the Hon'ble Supreme Court's judgment in ***Civil Appeal No. 4633 of 2021*** in the matter of ***Vidarbha Industries Power Ltd vs. Axis Bank Ltd.***, emphasizing the discretion of the Adjudicating Authority to admit a Section 7 application under the IBC. However, the context of the

judgment, where Vidarbha Industries was financially sound, differs from the current case where the Corporate Debtor has been struggling since 2013 undergoing through another debt restructuring process after a failed Corporate Debt Restructuring.

25. The Financial Creditor submits that the Intervenor also relied upon the Judgment of Hon'ble High Court of Bombay in Company Application No. 310,352 to 361 of 2003 in Company Petition No. 959 of 2002 in the matter of Bharat Petroleum Corporation versus National Organic Chemical Industries Ltd. But the reliance on the above judgments is also wholly misplaced, as the same is in relation to Section 557 of the Companies Act, 1956 while the present petition is under Section 7 of the IBC Code, 2016 where no such provision is available.

26. The Intervenor relied upon the Judgment of Honourable NCLAT in Company Appeal No. 51/2023 in the matter of Join Up Corporation versus Mr. R Sugumaran and other. The Financial Creditor contends that the Intervenor misinterpreted the judgment, as it only clarifies that only the Applicant initiating CIRP can withdraw the petition. Thus, the Judgment supports the Financial Creditors stance.

27. Given the cited judgments, the Intervention Application lacks merit, and the Financial Creditor requests the Tribunal to dismiss it with cost, while admitting the Company Petition.

Findings

28. We have heard the counsel for the parties and have gone through the records.

29. During the course of arguments, the learned counsel for the Applicant /intervener has argued that the intervention application is maintainable, and the case law relied upon by the counsel for the Respondent /Financial Creditor are not applicable being per in-curium. In this regard, the learned counsel for the Applicant has relied upon ***Bharat Petroleum Corporation Limited Vs National Organic Chemicals Limited 2003 SCC Online*** whereby Hon'ble High Court of Bombay has held that the interest of the creditors has to be considered even at the stage of the admission of the petition under section of 557 of the Companies Act. The learned counsel for the applicant has further relied upon ***Madhusudan Gordhandas Vs Madhu Woollen Industries Pvt Ltd. 1971 (3) SCC 635*** whereby it was held by the Hon'ble Supreme Court that if there is opposition to the making of winding up order by the creditors, the court will consider their wishes and may decline to pass a winding up order. On this very point, the learned counsel for the applicant has relied upon ***IDFC Bank Ltd. Vs Ruchi Soya Industries Ltd. 2017 SCC online Bombay 153 and Focus Advertising Pvt Ltd. Vs Ahura Blocks Pvt Ltd. 1974 online Bombay 109.***

30. The learned counsel for the applicant has further relied upon ***CFM Asset Reconstruction Pvt. Ltd. Vs Saudi Basic Industries Pvt Ltd 2022 SCC online***

NCLAT 442 whereby intervention at the instance of a Financial Creditor, who had exposure to the extent 90.19% debt owed by the Corporate Debtor, was permitted.

31. The Ld. Counsel for the applicant has further argued that intervention by a Financial Creditor having more than 90% debt of the Corporate Debtor deserves to be allowed as the interest of the majority stakeholders has to be kept in mind while considering initiation of insolvency proceedings which cannot be mechanically ordered. The Ld. Counsel for the applicant has further referred to ***Vidarbha Industries Ltd. Vs. Axis Bank Ltd. 2022(8) SCC 352*** whereby the Hon'ble Supreme Could held that exercise of jurisdiction under Section 7 by the Adjudicating Authority is discretionary and the Authority is not merely required to see whether there exists a debt and default but is also required to consider the viability and overall financial health of the Corporate Debtor. In this regard, it has further been argued by the Ld. Counsel for the applicant that the Corporate Debtor presently is at the stage of revival and the applicant has an exposure to the extent of Rs. 9500/- Crore to the Corporate Debtor and has sanctioned additional Rs. 400/- Crores in two tranches. On the contrary, the Corporate Debtor owes only Rs. 135 Crores to the Financial Creditor which is approximately 1.40% of the total debt of the Corporate Debtor. Therefore, the company cannot be pushed into insolvency at the behest of the Financial Creditor.

32. The Ld. Counsel of the applicant /intervener has further argued that even otherwise, the admission of the petition would be a futile exercise considering the fact that the applicant holds 97% of the debt and can always exercise its right to withdraw the application under Section 7 in terms of by invoking section 12A of the IB Code which permits withdrawal with the approval of 90% voting shares of the Committee of Creditors.

33. In the light of the above submissions, Ld. Counsel for the applicant/intervener has urged that the application is allowed, and the applicant may be impleaded as party and be also heard before any order in the petition under Section 7 filed by the Respondent/Financial Creditor is passed.

34. On the other hand, the Ld. counsel for the Respondent/Financial Creditor has argued that it is well settled that intervention at pre-admission stage is not maintainable. In support of his contentions, the Ld. Counsel for the Respondent has relied upon ***Deb Kumar Mujumdar Vs. State Bank of India Company Appeal (AT) (Ins.) No. 44/2018*** whereby it was held by the Hon'ble NCLAT that no person has a right to claim for hearing except the Corporate Debtor at the stage of application filed under Section 7 of the Code and no other financial creditor or operational creditor is required to be heard at that stage. The Ld. Counsel for the respondent has further relied upon ***Company Appeal (AT) (Ins.)676 of 2019 L&T Infrastructure Finance Company Ltd. Vs Gwalior Bypass Project Ltd.*** whereby also the similar view was taken while

holding that a member/shareholder has no right to intervene to oppose admission of application under section 7. The Ld. Counsel for the respondent has also relied upon ***Company Appeal (AT) (Ins.) 436-437/2019 Damont Developers Pvt Ltd. Vs Bank of Baroda and anr. as well as Company Appeal (AT) (ins) 113 of 2021 Vikas Kumar Garg Vs DMI Finance Private Limited and another.***

35. The Ld. Counsel for the Respondent further relied upon ***Company Appeal (AT) (Ins) 1231 of 2022 CFM Asset Reconstruction Private Limited Vs. Saudi Basic Industries Ltd Corporation Ltd and anr.*** whereby it was held that ordinarily, a financial creditor cannot be allowed to intervene in the proceeding under Section 9 but as an exception, a financial creditor can intervene if there are reasons and allegations which require consideration by the Adjudicating Authority.

36. As regard the contention raised by the Ld. Counsel for the applicant with regard to applicability of the law laid down by the Supreme Court in the matter of ***Vidarbha Industries Power Ltd. Vs. Axis Bank Ltd (Supra)***, it has been contended by the Ld. counsel for the Respondent that in the context of the facts and circumstances of the present case, no parallel can be drawn as in the instant case there are no circumstances existing nor any such circumstances have been brought on record to show that the Corporate Debtor is financially sound enough to sustain itself.

37. The Ld. Counsel for the Respondent has further argued that the plea raised on behalf of the applicant with regard to the provisions of section 12A of the Code is also erroneous. According to the Ld. Counsel of the Respondent, even a cursory look at the provisions of Section 12A would reveal that only the applicant, who initiated the CIRP proceedings, is entitled to withdraw the proceedings subject of course to the approval of 90% member of the CoC.

38. We have thoughtfully considered the rival contention raised by the Ld. Counsel for the parties and have also carefully gone through the record.

39. In our considered view, at the stage of admission in a petition under Section 7 of the Code, ordinarily no intervention is permissible as has been held by the Hon'ble NCLAT in number of cases relied upon by the Ld. Counsel for the Respondent/ Financial Creditor. In ***CFM Asset Reconstruction Private Limited Vs. Saudi Basic Industries Corporation Ltd and Anr. (Supra)*** also, it has been clarified that as held by the Hon'ble Supreme Court, in exceptional circumstances, a Financial Creditor can be permitted to intervene in an application under Section 9 if there are reasons and allegations which require consideration. Moreover, the said case, in which permission to intervene was granted to a Financial Creditor, was a case filed under Section 9 and not under Section 7.

40. So far as the case law referred to and relied upon by the Ld. Counsel for the applicant in ***Madhusudan Gordhandas Vs Madhu Woollen Industries Pvt Ltd. (Supra), IDFC Bank Ltd. Vs Ruchi Soya Industries Ltd. (Supra), Focus***

Advertising Pvt Ltd. Vs Ahura Blocks Pvt Ltd. (Supra) are concerned, in our considered view, the same cannot be applied to the facts and circumstance of the present case on the ground that the same dealt with the situation of winding up under the Companies Act, 1956 or 2013. Here one cannot be oblivious of the fact that dynamics of Insolvency and Bankruptcy Code, 2016 are different which represent a paradigm shift from the earlier regime under the Companies Act. Therefore, whatever was relevant at pre-winding up stage in proceedings under the Companies Act cannot be said to germane at pre-admission stage of section 7. Besides, winding up of a company under the Companies Act cannot be equated its resolution under the IB Code, 2016.

41. So far as the applicability of the law laid down in '***Vidarbha Industries***' case is concerned, again in the context of the instant case, no special circumstances have been highlighted by the counsel for the applicant which could indicate that the Corporate Debtor has sufficient resources at its disposal to sustain itself financially and it can be perceived to pay off its liabilities to the creditors in the near future. Here one cannot be unmindful of the fact that admittedly the Corporate Debtor owes a sum of Rs. 130 Crores to the Respondent. Even if the same may be a meagre amount when compared with the outstanding dues of the intervener which are stated to be to the tune of Rs. 9500 Crores the intervener cannot be allowed to usurp the legitimate rights of the other financial creditors to pursue the remedies available under the law. In any case, an amount of Rs. 130 odd crores are also not a mean amount.

42. As regards the contention raised on behalf of the applicant that the admission of the application under Section 7 of the Code would be a futile exercise in the light of the fact that since the intervener holds more than 90% of the financial debts and the petition would be defeated under Section 12A of the Code, at this stage we can only say that prima facie, post admission, only the applicant who files the application, has the right to withdraw and after the formation of the CoC such withdrawal requires approval of 90% of the CoC members. Be that as it may, at this stage, we do not deem it appropriate to allow the intervention application merely on the assumption that the intervener holds more than 90% of the debt of the Corporate Debtor and at its behest, the Petition would be defeated u/s 12A of the Code, 2016. As stated earlier, a financial creditor holding more share in the total debt cannot be allowed to arm-twist the other creditors.

43. As a result of discussion, we find the intervention application to be devoid of any merit at this stage and the same is accordingly **dismissed** with no order as to costs.

Sd/-

ANIL RAJ CHELLAN
(MEMBER TECHNICAL)

Sd/-

KULDIP KUMAR KAREER
(MEMBER JUDICIAL)

ANKIT/JUGAL