

**NATIONAL COMPANY LAW TRIBUNAL**  
**NEW DELHI BENCH-V**

(IB) 3434 (ND)/2019

IA/5412/2020

**IN THE MATTER OF:**

**M/S INDIAN DELCO PVT. LTD**

**THROUGH ITS DIRECTOR(s)/AUTHORISED**

**REPRESENTATIVE(s)**

**B-II/45, MOHAN CO-OPERATIVE INDUSTRIAL**

**ESTATE MATHURA ROAD, BADARPUR,**

**NEW DELHI-11004**

**...APPLICANT/FINANCIAL CREDITOR**

**VERSUS**

**SN JEE BUILD WELL PVT. LTD.**

**THROUGH ITS DIRECTOR(S)/AUTHORIZED**

**REPRESENTATIVE(S)**

**FF 112, INDRA PRAKASH, BARAKHAMBHA ROAD,**

**NEW DELHI-110001**

**CIN No: U45202DL2003PTC118764**

**....RESPONDENT NO.1**

**SECRETARY, MINISTRY OF CORPORATE AFFAIRS**

**GOVERNMENT OF INDIA**

**"A" WING, SHASTRI BHAWAN,**

**RAJENDRA PRASAD ROAD,**

**NEW DELHI-110001**

**....RESPONDENT NO.2**

**SECTION: U/S 7 of IBC, 2016**

**Order delivered on: 07.01.2021**

**CORAM:**

**MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)**

**MR. K.K. VOHRA, MEMBER (TECHNICAL)**



For the Applicant/Financial Creditor: Mr. Anish Gupta

For the Respondent/Corporate Debtor: Mr. Pallav

**ORDER**

**AS PER MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)**

1. The present petition is 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 Respondent/Corporate Debtor on grounds of its inability to liquidate its financial debt.
2. The facts mentioned in the application in brief are as follows:
  - i. That in the year 2013, the Corporate Debtor through its Directors had approached the Applicant for unsecured loan facility to the extent of INR 5,50,00,000/-.
  - ii. Further, the said request for the unsecured loan was in continuation of the unsecured loan facility already extended earlier by the Applicant to the Corporate Debtor. Considering the long term cordial relationship with the Corporate Debtor, the Applicant agreed to extend the aforementioned loan facility for an amount of INR 5,50,00,000/- to the Corporate Debtor. Accordingly, the Applicant and the Corporate Debtor entered into Loan Agreement. As per the Loan Agreement, the said loan facility was extended by the Applicant to the Corporate Debtor for a period of six years. Further, as per clause 1 of the Loan agreement, the Corporate Debtor was



liable to pay interest at the rate of 12% per annum to the Applicant. The amount of INR 3,59,24,490/- was disbursed by the Applicant to the Corporate Debtor till 28.05.2014.

- iii. Further, out of the total principal amount disbursed to the Corporate Debtor, on 17.12.2014, the Corporate Debtor made a payment to the Applicant towards the principal amount of INR 15,75,510/- and thereafter stopped making further payments towards the principal amount and no payment was received thereafter till recently. The Corporate Debtor also made some payments amounting to Rs. 61,24,769/- to the Applicant towards the interest till 19.01.2016 and thereafter stopped making further payments towards the interest and no payment was received thereafter till recently.
- iv. Further, since the loan was for a period of six years from the date of agreement, the said period has already expired on 03.08.2019. Accordingly, on 03.08.2019, the entire outstanding amount (Principal as well as the interest) has become due and payable by the Corporate Debtor.
- v. Further, confirmation of outstanding balance/ balance confirmation was given by the Corporate Debtor to the Applicant, confirming that an amount of Rs. 5,42,67,796/- outstanding as on 01.04.2019.
- vi. Further, the Applicant through its Advocate on 25.10.2019 issued a Demand Notice to the Corporate Debtor demanding the unpaid amount. Despite several reminders as well as the



legal notice, the Corporate Debtor failed to clear the outstanding payments of the Applicant.

3. The Respondent/Corporate Debtor has filed its reply and has asserted the following contentions:

- i. That the Respondent through its Director had entered into a Memorandum of Understanding (hereinafter referred to as the "MOU") dated 20.04.2011 with M/s Aarone Group & its Associates which includes Aarone Group, Mr. Lok Nath Sood and his Family, Lok Nath Farms Private Limited, represented by Mr. Nimish Ale, son of Shri Yog Raj Arora. In terms of the said MOU dated 20.04.2011 the Aarone Group was under an obligation to contribute fresh funds to the tune of Rs. 19 crores in the Respondent's Project at Dharuhera, Haryana.
- ii. Further, in terms of the said MOU dated 20.04.2011, the Respondent and Mr. Avneesh Kumar Singh was to be allotted 50% shareholding of M/s Lok Nath Farms Private Limited and similarly the Aarone Group or its Associates were to be given 50% shareholding in the Respondent Company. The Respondent allotted 25% of its shareholding to Mr. Nimish Arora (Representative of the Aarone Group); however, the said Aarone Group failed to comply with its obligation to allot 50% of shareholding of the M/s Loknath Farms Private Limited to the Respondent or Mr. Avneesh Kumar Singh. Pursuant to the MoU dated 20.04.2011, Mr. Nimish Arora and Ms. Ritika Arora were also made Directors in the Respondent Company.





- iii. Thereafter, the said Mr. Nimish Arora, misused his powers as the Director of the Respondent and carried out various fraud and frivolous transactions of value of more than Rs. 140 crores in the name of the Respondent and which includes the entry of loan/debt of the Applicant herein i.e. Indian Delco Private Limited. Further, the funds transferred to the Respondent were simultaneously withdrawn/siphoned off and transferred to various companies of M/s Aarone Group.
- iv. It is relevant to mention here that the respondent has never authorized Mr. Nimish Arora or any other person representing the Aarone Group to take any credit facility on behalf of the Company.
- v. That the alleged credit facility extended by the Applicant to the respondent was also part of such fraud and sham transactions executed by Mr. Nimish Arora without any authority in its favour. Further, the funds transferred by the Applicant to the Respondent were also later siphoned off/transferred to the various companies under the Aarone Group.
- vi. Further, any such alleged credit facility extended by the Applicant to Mr. Nimish Arora or the alleged loan agreement dated 02.08.2013, signed by Mr. Nimish Arora is unenforceable qua the Respondent and are void ab-initio. It is pertinent to note here that as per Section 292 of the Companies Act, 2013, and Section 179(3)(d) of the



Companies Act, 2013, the Board of Directors of the Company shall exercise the power to borrow moneys only by means of resolution passed at the meeting of the Board of Directors. It is also no longer res-integra that any action which requires to be approved in the meeting of the Board of Directors or shareholder; if not approved in the manner provided under the Companies Act shall be unauthorized and the Company shall not be bound by the same.

vii. Further, the Respondent has never authorized Mr. Nimish Arora to sign any such alleged Loan Agreement dated 02.08.2013 or to take any credit facility from the Applicant. Therefore, neither the Respondent recognizes the Applicant as a Creditor nor has any liability to pay any such alleged amount to the Applicant.

viii. Further, Mr. Nimish Arora, who had allegedly signed the Loan Agreement dated 02.08.2013, has caused huge wrongful loss to the Respondent for his wrongful gain and burdened the company with huge debts. Firstly, Mr. Nimish Arora has abused his position as a Director in the Respondent by obtaining the unauthorized alleged credit facility from third parties including the Applicant without any authorization/resolution passed in the meeting of the Board of Directors. Secondly, the alleged amount paid by the said third parties was represented to the Respondent as a contribution on behalf of the Aarone Group under the MOU dated 20.04.2011 and later Mr. Nimish Arora diverted the



said funds from the Respondent to their own companies, thus, causing wrongful loss to the Respondent for his own wrongful gain.

ix. Further, in terms of Section 180(c) of the Companies Act, 2013, the Board of Directors of the company can exercise the power to borrow money only with consent of the company by a special resolution, if the borrowed money, together with the money already borrowed by the company will exceeds aggregate of its paid up share capital. The paid up share capital of the Respondent is Rs. 2 crores while the claim of the applicant herein is of more than Rs. 5 crores including interest. Therefore, the alleged transaction of the Applicant advancing credit to the Respondent is invalid and ineffective qua the respondent.

x. Further, the transaction in respect of which the instant Application under Section 7 of the IBC has been filed by the Applicant, is a fraudulent transaction and thus hit by Section 65 of the IBC.

4. Further, the Respondent has also filed an application captioned **IA/5412(ND) 2020** under Section 60(5) of the Code read with Section 151 of the CPC for bringing the Forensic Audit Report on record. It is submitted that the said Forensic Audit report reveals the irregularities and fraudulent transfers in the form of web of entries conducted by the former director of the Corporate Debtor. Further, the said forensic audit report also reveals that the alleged transaction of the applicant is not only unauthorized and

illegal but also collusive between the former director of the Respondent and the Applicant. Therefore, it is of utmost importance to bring the said forensic audit report on record for the efficient and effective disposal of the present application.

5. We have heard the Ld. Counsel for the applicant and respondent and perused the averments made in the application, reply and averment made in IA/5412/2020 filed by the respondent.
6. Ld. Counsel for the applicant in course of his arguments submitted that on the basis of agreement dated 02.08.2013, the Corporate Debtor had entered into a loan agreement with the applicant for a period of 6 years commencing from the date of execution of agreement and accordingly, the amount was disbursed to the Corporate Debtor. He further submitted that on 17.12.2014, the Corporate Debtor made a payment of Rs. 1575510/- and thereafter stopped making payments. He further submitted that recently the Corporate Debtor has also made some payments of Rs. 6124769/- towards the interest till 19.01.2016 but thereafter no amount was paid. He further submitted that since the period of loan was for 6 years which has already been expired on 03.08.2019, therefore, the cause of action arose on 03.08.2019. He further submitted that the Corporate Debtor also confirmed the outstanding amount in its balance sheet i.e. Rs. 54267796/-.
7. He further submitted that thereafter the applicant sent the demand notice dated 25.10.2019 but despite several reminders no amount was paid.





8. He further submitted that so far under Section 7 of IBC is concerned is not required to raise any dispute rather the financial creditor is to establish that a loan was paid and that has not been repaid.
9. On the other hand, Ld. Counsel for the respondent opposed the prayer on the ground that one Mr. Nimish Arora had misused his power as a director of the respondent company and committed various frauds and frivolous transactions. He further submitted that this agreement was signed by the Mr. Nimish Arora who was not authorised by the Board of Directors to sign the loan agreement. He further submitted that in view of Section 7(3) and (4) of the IBC, the Adjudicating Authority has to ascertain the existence of default is respect of a legally binding debt, but, in the present case, the alleged debt in question is surrounded by the suspicious circumstances, which tantamount to the fraud played upon by the Aarone Group in collusion with the applicant.
10. He further submitted that due to this reason the Corporate Debtor through its directors and shareholder Mr. Avneesh Kumar Singh had got the Forensic Audit done of the transaction of the Corporate Debtor.
11. He further submitted that by filing IA/5412/2020 the Corporate Debtor bring on the record the Forensic Audit Report which shows that how alleged transaction in question is unauthorized, illegal and collusive between the applicant and Mr. Nimish Arora.

12. Ld. Counsel for corporate debtor referred the page 33 of the Forensic Audit Report ***"From the above data, it can safely be inferred that fund received from Indian Delco Private Limited was Rs. 375 lakhs but simultaneously a total sum of Rs. 225 lakhs is diverted to other company leaving only Rs. 150 lakhs in the company for proper utilization in the project whereas entire sum of Rs. 375 lakhs in the books of accounts of the company as debt payable to Indian Delco as unsecured loan. No written loan agreement is found in the records of the company pertaining to the aforesated alleged loan. No record is found as regard any authorization or resolution ever passed in the meeting of Board of Directors to raise afore stated loan and or authorizing any of the directors to execute corresponding agreement with Indian Delco Private Limited. Thus, there is clear infringement of Section 179 of the Companies Act, 2013 and the alleged transaction is not binding on the company"***.

13. He further submitted that in view of Section 180(1)(c) of the Companies Act, 2013, a Special Resolution was needed to secure a loan in absence of which the transaction stands void.

14. He further submitted that no Special Resolution was introduced at the first instance in any Board Meeting of the Company or presented for approval in general meeting of the company.

15. He further submitted that the applicant owns several equity shares in group companies belonging to the Aarone Group and the

applicant has made investments in a project developed by the Aarone Group, therefore, that transaction is not a genuine transactions and proceedings under Section 65 of the IBC be initiated against the applicant.

16. He further submitted that as per Section 179(3)(d) of the Companies Act, 2013 deals with the power of board of Director to borrow monies on behalf of the company and it shall only be exercised by means of the special resolution passed at the meeting as per Section 180(1)(c) of the Companies Act, 2013.

17. He further submitted that the respondent has placed reliance upon the decisions i.e. Meena Chawla Vs. Prism Entertainment Private Limited RPA (OS) 48/2011 by the Hon'ble Delhi High Court, Tristar Consultants Vs. Vcustomer Services India Private Limited 2007 LAWPACK Delhi 31861, 2007 AIR Delhi 157 and Nibro Limited Vs. National Insurance Co. Ltd. MANU/DE/00005/1991 and on the basis of that Ld. Counsel for the respondent submitted that Doctrine of Indoor Management is not applicable if a person before advancing the loan has not verified.

18. He further submitted that the applicant has not filed the rejoinder to the reply, therefore, the averment made in the reply is deemed to be admitted by the applicant.

19. In reply to the submission of the Ld. Counsel for the respondent, the Ld. Counsel for the applicant submitted that the decision upon which the respondent has placed reliance is not applicable because it is not denied by the respondent that the



amount has not been paid to the respondent company of course the respondent has taken the ground that a director, who had entered into a agreement has misused his power vested to him.

20. He further submitted that the Doctrine of Indoor Management is very much applicable in the present case because it is admitted by the respondent the amount has been paid to the company.

21. Now, in the light of the submissions raised on behalf of the parties, we shall consider the averment made in the application, reply as well as averment made in IA/5412/2020.

22. Since, the respondent has taken a defence that the Director who has entered into an agreement with the applicant had obtained the amount without the approval of the Board of Director and without having special resolution passed by the board of Director, therefore, we would like to consider this submission at first.

23. At this juncture, we would like to refer the averment made in para 4 of the written submissions in which the respondent has quoted page 33 of IA/5412/2020 and the same is quoted below: -

***“From the above data, it can safely be inferred that fund received from Indian Delco Private Limited was Rs. 375 lakhs but simultaneously a total sum of Rs. 225 lakhs is diverted to other company leaving only Rs. 150 lakhs in the company for proper utilization in the project whereas entire sum of Rs. 375 lakhs in the books of accounts of the company as debt payable to Indian Delco as unsecured loan. No written loan***





*agreement is found in the records of the company pertaining to the aforesaid alleged loan. No record is found as regard any authorization or resolution ever passed in the meeting of Board of Directors to raise afore stated loan and or authorizing any of the directors to execute corresponding agreement with Indian Delco Private Limited. Thus there is clear infringement of Section 179 of the Companies Act, 2013 and the alleged transaction is not binding on the company”.*

24. From the above averment, we notice that even in the Forensic Audit Report, the Auditor has admitted this fact that the fund of Rs. 375 lakhs was received from the applicant that is Indian Delco Private Limited and it is also admitted that out of that amount Rs. 150 lakhs was properly utilized in the Company. Of course, it is further opined by the Auditor that Rs. 225 lakhs was diverted to the other company, which means, even in the Forensic Audit Report upon which the respondent has placed reliance, it is clearly mentioned that Rs. 375 lakhs was received from the applicant.

25. Now we shall examine whether the decisions upon which the respondent has placed reliance is applicable and Doctrine of Indoor Management is not applicable in the case in hand.

26. At this juncture, we would like to refer the relevant provision of Section 399 of the Companies Act and the same is quoted below:

***(1) Save as otherwise provided elsewhere in this Act, any person may—***



*(a) inspect by electronic means any documents kept by the Registrar in accordance with the rules made, being documents filed or registered by him in pursuance of this Act, or making a record of any fact required or authorised to be recorded or registered in pursuance of this Act, on payment for each inspection of such fees as may be prescribed;*

*(b) require a certificate of the incorporation of any company, or a copy or extract of any other document or any part of any other document to be certified by the Registrar, on payment in advance of such fees as may be prescribed:*

*Provided that the rights conferred by this sub-section shall be exercisable—*

*(i) in relation to documents delivered to the Registrar with a prospectus in pursuance of section 26, only during the fourteen days beginning with the date of publication of the prospectus; and at other times, only with the permission of the Central Government ; and*

*(ii) in relation to documents so delivered in pursuance of clause (b) of subsection (1) of section 388, only during the fourteen days beginning with the date of the prospectus; and at other times, only with the permission of the Central Government.*

*(2) No process for compelling the production of any document kept by the Registrar shall issue from any court or the Tribunal except with the leave of that court or the Tribunal and any such process, if issued, shall bear thereon a statement that it is issued with the leave of the court or the Tribunal. (Font in Blue notified on 01-06-2016)*

*(3) A copy of, or extract from, any document kept and registered at any of the offices for the registration of companies under this Act, certified to be a true copy by the Registrar (whose official position it shall not be necessary to prove), shall, in all legal proceedings, be admissible in evidence as of equal validity with the original document.*



27. Mere plain reading of the provision shows that under this provision any person may inspect the documents, which are kept in the office of Registrar regarding the incorporation of the company, which includes the Article of Association and Memorandum of Association. "The documents which a person is entitled to get from the office of Registrar u/s 399 of the Companies Act and if he fails to see and verify it prior to entering with a contract with the company then the company is not liable for that act, if it is done by the Director, because it comes under the doctrine of constructive ' notice. But the question is "does the doctrine of constructive notice allow the outsiders to have notice of internal affairs of the company", the answer is no, because doctrine of constructive notice is subject to exception i.e Indoor Management and that is the reason petitioner has taken this plea.

28. At this juncture, we would also like to refer Section 179 and 180 of the Companies Act upon which the respondent has placed reliance and the same is quoted below: -

***179. (1) The Board of Directors of a company shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorised to exercise and do:***

***Provided that in exercising such power or doing such act or thing, the Board shall be subject to the provisions contained in that behalf in this Act, or in the memorandum or articles, or in any regulations not inconsistent therewith and duly made thereunder, including regulations made by the company in general meeting:***



*Provided further that the Board shall not exercise any power or do any act or thing which is directed or required, whether under this Act or by the memorandum or articles of the company or otherwise, to be exercised or done by the company in general meeting.*

*(2) No regulation made by the company in general meeting shall invalidate any prior act of the Board which would have been valid if that regulation had not been made.*

*2&3[(3) The Board of Directors of a company shall exercise the following powers on behalf of the company by means of resolutions passed at meetings of the Board, namely:—*

*(a) to make calls on shareholders in respect of money unpaid on their shares;*

*(b) to authorise buy-back of securities under section 68;*

*(c) to issue securities, including debentures, whether in or outside India;*

*1[(d) to borrow monies;*

*(e) to invest the funds of the company;*

*(f) to grant loans or give guarantee or provide security in respect of loans;]*

*(g) to approve financial statement and the Board's report;*

*(h) to diversify the business of the company;*

*(i) to approve amalgamation, merger or reconstruction;*

*(j) to take over a company or acquire a controlling or substantial stake in another company;*

*(k) any other matter which may be prescribed:*

*Provided that the Board may, by a resolution passed at a meeting, delegate to any committee of directors, the managing director, the manager or any other principal officer of the company or in the case of a branch office of the company, the principal officer of the branch office, the*



*powers specified in clauses (d) to (f) on such conditions as it may specify:*

*[Provided further that the acceptance by a banking company in the ordinary course of its business of deposits of money from the public repayable on demand or otherwise and withdrawable by cheque, draft, order or otherwise, or the placing of monies on deposit by a banking company with another banking company on such conditions as the Board may prescribe, shall not be deemed to be a borrowing of monies or, as the case may be, a making of loans by a banking company within the meaning of this section.]*

*Explanation I.—Nothing in clause (d) shall apply to borrowings by a banking company from other banking companies or from the Reserve Bank of India, the State Bank of India or any other banks established by or under any Act.*

*Explanation II.—In respect of dealings between a company and its bankers, the exercise by the company of the power specified in clause (d) shall mean the arrangement made by the company with its bankers for the borrowing of money by way of overdraft or cash credit or otherwise and not the actual day-to-day operation on overdraft, cash credit or other accounts by means of which the arrangement so made is actually availed of.*

*(4) Nothing in this section shall be deemed to affect the right of the company in general meeting to impose restrictions and conditions on the exercise by the Board of any of the powers specified in this section.*

#### **180. Restrictions on powers of Board**

*(1) The Board of Directors of a company shall exercise the following powers only*

*with the consent of the company by a special resolution, namely:—*

*(a) to sell, lease or otherwise dispose of the whole or substantially the whole of*



*the undertaking of the company or where the company owns more than one undertaking,*

*of the whole or substantially the whole of any of such undertakings.*

*Explanation.—For the purposes of this clause,—*

*(i) “undertaking” shall mean an undertaking in which the investment of*

*the company exceeds twenty per cent. of its net worth as per the audited balance*

*sheet of the preceding financial year or an undertaking which generates twenty*

*per cent. of the total income of the company during the previous financial year;*

*(ii) the expression “substantially the whole of the undertaking” in any*

*financial year shall mean twenty per cent. or more of the value of the undertaking*

*as per the audited balance sheet of the preceding financial year;*

*(b) to invest otherwise in trust securities the amount of compensation received*

*by it as a result of any merger or amalgamation;*

*(c) to borrow money, where the money to be borrowed, together with the money*

*already borrowed by the company will exceed aggregate of its paid-up share capital*

*and free reserves, apart from temporary loans obtained from the company’s bankers in*

*the ordinary course of business:*

*Provided that the acceptance by a banking company, in the ordinary course of*

*its business, of deposits of money from the public, repayable on demand or otherwise,*

*and withdrawable by cheque, draft, order or otherwise, shall not be deemed to be a*

*borrowing of monies by the banking company within the meaning of this clause.*

*Explanation.—For the purposes of this clause, the expression “temporary loans”*

*means loans repayable on demand or within six months from the date of the loan such*

*as short-term, cash credit arrangements, the discounting of bills and the issue of other*

*short-term loans of a seasonal character, but does not include loans raised for the*

*purpose of financial expenditure of a capital nature;*

*(d) to remit, or give time for the repayment of, any debt due from a director.*

*(2) Every special resolution passed by the company in general meeting in relation to*

*the exercise of the powers referred to in clause (c) of sub-section (1) shall specify the total*

*amount up to which monies may be borrowed by the Board of Directors.*

*(3) Nothing contained in clause (a) of sub-section (1) shall affect—*

*(a) the title of a buyer or other person who buys or takes on lease any property,*

*investment or undertaking as is referred to in that clause, in good faith; or*

*(b) the sale or lease of any property of the company where the ordinary business*

*of the company consists of, or comprises, such selling or leasing.*

*(4) Any special resolution passed by the company consenting to the transaction as is*





***referred to in clause (a) of sub-section (1) may stipulate such conditions as may be specified***

***in such resolution, including conditions regarding the use, disposal or investment of the sale***

***proceeds which may result from the transactions:***

***Provided that this sub-section shall not be deemed to authorise the company to effect***

***any reduction in its capital except in accordance with the provisions contained in this Act.***

***(5) No debt incurred by the company in excess of the limit imposed by clause (c) of***

***sub-section (1) shall be valid or effectual, unless the lender proves that he advanced the loan***

***in good faith and without knowledge that the limit imposed by that clause had been exceeded.***

29. When we shall consider these two provisions together then we notice that in view of Section 179(3) (d) the Board of Director of Company shall exercise its powers subject to the provision contained in the Act or in the memorandum or articles and one of the power which is referred in Section 179 (3)(d) of the Companies Act, 2013 is also to borrow the money, of course, in view of Section 180(1)(c) that is subject to special resolution passed by the Board of Directors and in view of Section 180(5) of the Companies Act, 2013 no debt incurred by the company in excess of the limit imposed by Clause C of Sub Section 1 shall be valid or effectual unless the lender proves that he advanced the loan in good faith without knowledge that the limit imposed by that clause had been exceeded but herein the case in hand, we notice that it is not the case of respondent that the debt incurred by the company is in excess of the limit imposed by Section 180(1) (c) of the Companies Act 2013 rather the claim of the respondent is that the Director who signed the loan agreement had not been authorized by the special resolution passed by the Board of Directors as required



under Section 180 of the Companies Act, 2013, therefore, Section 180(5) of the Companies Act is not applicable.

30. We further notice that in view of Section 180 except for the reasons referred in Section 180 (5) of the Companies Act, 2013 there is no other conditions in which the loan which the company has received from the third person shall be declared invalid, therefore, the contention of the Ld. Counsel for the respondent is that in the absence of the special resolution, the amount which was received by the company on the basis of agreement executed by the one of the Director is void ab initio, in our considered view is not liable to be accepted.
31. We further notice that in view of first proviso of Section 179(1) of the Company Act 2013 the Board of Director shall also exercise its powers in the manner stated in the memorandum or articles of association but we notice that the respondent has not enclosed the articles of association or memorandum of association of the respondent company to show that the Director was not authorized to enter into an agreement and to receive the loan, therefore, in the absence of such document, we are of the considered view that the respondent has failed to establish this fact that the person who signed the loan agreement was not authorized under the Articles of Association or memorandum of Association to borrow the loan for the benefit of the company.
32. At this juncture, we would like to refer the submission of the Ld. Counsel for the respondent as well as the Forensic Audit report referred in para 4 of the written submission and the **IA/5412/2020** and we notice that it is also admitted by the Forensic Auditor in Forensic Audit Report that the amount was received from the applicant and part of the amount was utilised for the benefit of the project of the respondent company and so far the decision upon which the respondent has placed reliance is

concerned in view of the facts and law discussed by us in the  
aforementioned Paragraph, in our considered view, in the absence  
of Articles of Association or Memorandum of Association, we  
cannot disbelieve the contention of the applicant that the loan  
agreement was duly executed by the Director of the respondent  
company as per the provision contained under the Companies Act.  
In our considered view, the facts of the decisions upon which the  
respondent has placed reliance is different from the facts of the  
case in hand, therefore, those decisions will not help the  
respondent to substantiate their claim rather in view of Section  
399 of the Companies Act and for the reasons discussed above,  
this submission of the respondent is protected under the Doctrine  
of Indoor management especially when an application under  
Section 7 of the IBC is filed.

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

***(1) A financial creditor either by itself or jointly with other financial creditors other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government, may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred. Provided that for the financial creditors, referred to in clauses (a) and (b) of the sub-section (6A) of the section 21, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such creditors in the same class or not less than ten percent. of the total number of such creditors in the same class, whichever is less:***

***Provided further that for the financial creditors who are allottees under a real estate project, an application for***





*initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten percent. of the total number of such allottees under the same real estate project, whichever is less:*

*Provided also that where an application for initiating the corporate insolvency resolution process against a corporate debtor has been filed by a financial creditor referred to in the first or second provisos and has not been admitted by the Adjudicating Authority before the commencement of the insolvency and Bankruptcy Code (Amendment) Ordinance, 2019, such application shall be modified to comply with the requirements of the first or second provisos as the case may be within thirty days of the commencement of the said Ordinance, failing which the application shall be deemed to be withdrawn before its admission.*

*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 sub-section (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 sub-section (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.*

34. Mere plain reading of the provision shows that in order to trigger Section 7 of the IBC the applicant is required to establish that the default has occurred but herein the case in hand we notice that it is not denied by the respondent that applicant has not paid the amount. Rather in the Forensic Audit Report that amount has been shown as received by the company and that has also been utilised for the benefit of the project of the company.

Therefore, the receiving of the amount has been not denied by the



respondent and it is also admitted by the respondent that amount has not been paid because the director who entered into an agreement was not authorized by the special resolution as required under Section 180(1) of the Companies Act to borrow the loan and in view of Section 7(5) of the IBC the moment the Adjudicating Authority came to the conclusion that default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional then the Adjudicating Authority has no option but to admit the application filed under Section 7 of the IBC. So far the dispute is concerned like Section 9 the Corporate Debtor is not required to raise under Section 7 of the IBC and we further notice that the applicant has also proposed the name of the IRP Mr. Rakesh Kumar Jain who has also given their consent in Form 2 which is available at page 25 of the application and he also gave a declaration that no disciplinary proceeding is pending against him.

35. In the light of that, when we consider the case in hand then we find that the applicant has succeeded to establish that there is a financial debt and Corporate Debtor is in default in making the payment of that financial debt, the application is complete and also proposed the name of IRP **Mr. Rakesh Kumar Jain having registration number IBBII IPA-001/IPP01297/2018-19/12068** Who have also sent the written consent and there is no disciplinary proceeding pending against him.

36. Under such circumstances, we hereby inclined to admit this application. **Accordingly, we hereby ADMIT this application.**



The applicant has proposed the name of the IRP therefore, we appoint **Mr. Rakesh Kumar Jain** having registration number **IBBII IPA-001/IPP01297/2018-19/12068** as IRP and initiate CIRP against the respondent. A moratorium in terms of Section 14 of the IBC, 2016 shall come into effect forthwith staying: -

**1. effect forthwith staying: -**

**(a) 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;**

**(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.**

**Further:**

**(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.*

37. Financial Creditor is directed to deposit the fee of Rs. 2,00,000/- to meet the immediate expenses of the IRP within two weeks. 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 and IRP is directed to follow the rules and regulations as per Section 15, 16, 17 & 18 of IBC.

38. Registry is directed to communicate the order with the IRP as well both the parties.

39. With this Order, the IA 5412/2020 also stands disposed off.



**K. K. VOHRA**  
**Member (T)**



**ABNI RANJAN KUMAR SINHA**  
**Member (J)**