

IN THE NATIONAL COMPANY LAW TRIBUNAL AT ALLAHABAD
BENCH

CP NO.(IB)190/ALD/2018

*Section 7 of I & B Code,
2016 read with Rule 4
of the I & B Rules, 2016)*

IN THE MATTER OF

M/S DASAPRAKASH HOTELS AND RESORTS PVT. LTD.

Having its registered office at,
F-106, Windsor Plaza,
Sansar Chandra Road, Jaipur – 302 001, Rajasthan.

..... APPLICANT/FINANCIAL CREDITOR

VERSUS

M/S KUMAR ASHIYANA PVT. LTD.

Having its registered office at,
Shop No.10, Vibhav Nagar Market, Agra,
Uttar Pradesh – 282 001.

..... CORPORATE DEBTOR

JUDGMENT/ORDER DELIVERED ON 19.09.2018

CORAM : **SH. V.P. SINGH, MEMBER (J)**
MS. SAROJ RAJWARE, MEMBER (T)

For the Financial Creditor: Shri Nishant Mishra, Advocate

Along with

Shri Tanmay Sadh, Advocate

For the Corporate Debtor: Shri Vinayak Mithal, Advocate

Along with

Shri Swapnil Kumar, Advocate

PER SE : **SH. V.P. SINGH, MEMBER (J)**

ORDER/JUDGMENT

1. The present application has been filed by the Financial Creditor/Applicant, i.e. M/s Dasaprakash Hotels & Resorts Pvt. Ltd. U/s 7 of the Insolvency & Bankruptcy Code, 2016 read with Rule 4 of the Insolvency & Bankruptcy Rules, 2016, seeking for initiation of Corporate Insolvency Resolution Process (CIRP) in respect of the Corporate Debtor Company i.e. M/s Kumar Ashiyana Pvt. Ltd.

- 2.** The total amount of default is 40,25,000/- and the date of default is 19.9.2015.
- 3.** The brief facts of the case are stated as under:
 - I.** That the Applicant is a company incorporated under the provisions of the erstwhile Companies Act, 1956 and is engaged in the running of hotels and has gained considerable expertise in the same.
 - II.** That the Corporate Debtor had approached the Applicant for the purpose of operating their hotel on a revenue sharing basis. The Applicant and the Corporate Debtor entered into a lease rent agreement dated 4.9.2007 whereby the Applicant advanced a loan of Rs. 54,00,000/- to the Corporate Debtor for the purpose of renovating the Hotel and thereafter the Corporate Debtor was to hand over the possession of the Hotel to the Applicant for running the same on a revenue sharing basis. Further the Applicant also advance a loan on Rs. 2,89,500/- to the Corporate Debtor from time to time thereby increasing the total loan amount to Rs. 56,89,500/.
 - III.** Subsequently the Corporate Debtor entered into a tripartite agreement 30.01.2008 with the State Bank of Patiala where the Applicant was merely a guarantor, for borrowing Rs. 75,00,000/-
 - IV.** That the Applicant and the Corporate Debtor mutually terminated the lease rent agreement dated 4.9.2007 with effect from 01.01.2012.
 - V.** That due to the termination of the lease rent agreement the amount of Rs. 54,00,000/- advanced by the Applicant to the Corporate Debtor became due, and the Applicant served a demand notice to the Corporate for the recovery of the said amount.
 - VI.** Corporate Debtor replied to the said notice admitting the debt but did not pay the same due to which the Applicant initiated winding up proceedings against the Corporate Debtor under Companies Act, 1956.

- VII.** During the pendency of the winding up proceedings, the Corporate Debtor approached the Applicant for a compromise. After that, the Corporate Debtor and the Applicant entered into a compromise agreement dated 19.7.2014 whereby the Applicant agreed to settle the arrears of Rs. 56,89,500/- at Rs. 40,25,000/- only.
 - VIII.** Corporate Debtor filed the aforesaid compromise agreement before the Hon'ble Allahabad High Court, instead of which the Hon'ble High Court dismissed the winding up petition as infructuous.
 - IX.** As per the compromise agreement dated 19.7.2014 the amount of Rs. 40,25,000/- was to be paid by the Corporate Debtor to the Applicant with a period of 14 months from the date of the compromise agreement failing which the Corporate Debtor was liable to pay an interest @ 12 %.
 - X.** Corporate Debtor failed to honour the compromise agreement, and therefore the Applicant initiated insolvency proceedings against the Corporate Debtor under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'IB Code').
 - XI.** Application under Section 9 was dismissed by this Hon'ble Tribunal vide order dated 28.02.2018 with a liberty to file a fresh Application. Hence the Applicant has preferred this present Application under Section 7 of the Code.
 - XII.** As per the Petitioner cause of action for filing present Application arises out of a compromise agreement dated 19.07.2014 whereby, the Corporate Debtor has settled his existing arrears of Rs. 56,89,500/- advanced as a loan by the Applicant under the agreement dated 4.9.2007, for Rs. 40,25,000/-.
4. In reply to present application Counsel for the Corporate Debtor stated as under:
- I. That the Applicant/Financial Creditor is relying upon an agreement dated 14.09.2007 to prove advancement of loan which was a lease

rent agreement. The Section 17 of the Registration Act mandates compulsory registration of a lease rent agreement under, 1908. But the aforesaid agreement is not registered. Therefore, the claim of the Applicant/Financial Creditor by such agreement is not maintainable.

II. That the Respondent/Corporate Debtor and Applicant/Financial Creditor had together taken a loan of Rs. 75,00,000 from the State Bank of Patiala in 2008 and executed a tripartite agreement on 30.01.2008. As per the tripartite agreement, Applicant/Financial Creditor was to pay Rs. 1,75,000 p.m. to the Bank in discharge of its loan liability. However, the Applicant/ Financial Creditor defaulted in the payment of lease rent from 01.01.2012 and unilaterally rescinded the contract. Ultimately, the Respondent/Corporate Debtor had to pay the balance amount of loan to the Bank and is entitled to receive damages from Applicant/ Financial Creditor for such breach.

III. That the winding up petition filed by the Applicant/Financial Creditor before the Hon'ble High Court was also filed by the alleged agreement executed on 14.09.2007.

IV. That during the pendency winding petition before the Hon'ble High Court, the Applicant/ Financial Creditor claims to have entered into an alleged compromise agreement dated 19.07.2014 with one of the erstwhile Directors of the Respondent/Corporate Debtor. However, the Respondent/Corporate Debtor categorically submits that the said Director, Basant Kumar, was never authorized by the Respondent/Corporate Debtor to contest the winding petition or to enter into any such compromise on behalf of the company.

V. That in the absence of any Board Resolution authorizing erstwhile Director Basant Kumar, the alleged compromise is null and void in

the eyes of law and the Respondent/Corporate Debtor has already filed Original Suit No. 191/2018 (M/s Kumar Ashiyana Pvt. Ltd. v. M/s Dasaprakasha Hotels and Resorts Pvt. Ltd.) before the competent civil court in Agra on 20.02.2018 seeking declaration of the aforesaid compromise as null and void which is still pending.

5. Having heard both the parties and on perusal of record, it is clear that Applicant has filed present Application for the alleged breach of Compromise Agreement dated 19.07.2014 arising out of Company Petition No. 43 of 2012 which got dismissed as infructuous vide order dated 07.08.2014 and it will be treated as decree of the court. Under that agreement the amount of Rs. 40,25,000/- was to be paid by the Corporate Debtor to the Applicant with a period of 14 months from the date of the compromise agreement failing which the Corporate Debtor was liable to pay an interest @ 12%.

Objection of the Corporate Debtor regarding the validity of Lease Rent Agreement due to non –registration is not under our jurisdiction, so will not delve into that issue. Further, the objection of the Corporate Debtor regarding there being no Board Resolution authorising Mr Basant Kumar to enter into any compromise agreement is not tenable because Corporate Debtor cannot evade their liability to pay the defaulted amount by merely saying Mr Basant Kumar was not authorised to do as there is no board resolution to that effect. Even on assuming without accepting that no such board resolution was there on record authorising Mr Basant Kumar to enter into such a compromise agreement, issuing board resolution is a matter of internal management of the Company. Further, the Company is liable for the acts committed by its directors and is bound to honour the agreement entered by the Directors on behalf of the Company.

Deciding the validity of Agreements entered between parties is not within ambit of Insolvency and Bankruptcy Code, 2016. Scope of IBC is limited to whether there is debt and due to non-payment of the debt, default has

occurred. Hence, in this Application question for our consideration is *Whether the alleged breach of Compromise Agreement dated 19.07. 2014.will under the definition of Financial Debt as per Section 5(8) of the code and whether the Applicant will be treated as Financial Creditor as Section 5(7) of the code?*

This Application is filed by the applicant by alleged breach of compromise agreement dated 19.07.2014. Corporate Debtor failed to honour the compromise agreement, and no payment was made. The aforesaid compromise agreement was also brought on record before Hon'ble Allahabad High Court and based on the same, Company Petition No. 43 of 2012 was dismissed as infructuous vide order dated 07.08.2014. As per Section 3 (10) of the IBC Creditor also include decree holder. Section 3(10) of the IBC is reproduced herein under.

*“creditor” means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, **an unsecured creditor and a decree-holder;***

Section 5(8) of the Code defines the Financial Debt as under:

(8) “financial debt” means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes–

- (a) money borrowed against the payment of interest;*
- (b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;*
- (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;*
- (d) **the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;***
- (e) receivables sold or discounted other than any receivables sold on non-recourse basis;*
- (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;*

2[Explanation. -For the purposes of this sub-clause, -

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;
(h) any counter-indemnity obligation in respect of a guarantee,

indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clause (a) to (h) of this clause;

Since the present debt arises out of the compromise agreement dated 19.7.2014 arising out of Company Petition No. 43 of 2012 which got dismissed as infructuous vide order dated 07.08.2014 and it will be treated as decree of the court. In the compromise agreement it is stated that on a failure to pay the said amount the Corporate Debtor would be liable to pay an interest @ 12% p.a. Therefore, the said amount is a debt disbursed against the consideration of time value of money and hence is covered under the definition of financial debt and Applicant will be treated as Financial Creditor.

In the aforesaid background, an application on behalf of financial creditor/ Applicant is complete, and no disciplinary proceeding is pending against proposed IRP. Financial Creditor has suggested the name Mr Mahendra Prakash Khandelwal, IBBI/IPA-002/IP-N00446/2017-2018/11275 , email id mahendra927@gmail.com for appointment as Interim Resolution Professional(IRP). He has filed a declaration in form 2 affirming that he is registered insolvency professional and no disciplinary proceedings are pending against him. Given fact above Shri Chanchal Dua, deserves to be appointed as Interim Resolution Professional(IRP).

There is default in the payment of the financial debt. Therefore, as per section 7(5)(a) of the code, the present application filed U/S 7 of the I B Code deserves to be admitted.

ORDER

Application on behalf of Financial Creditor/ Applicant filed U/S 7 of the I&B Code 2016 for initiation of corporate Insolvency process is admitted.

That the order of moratorium u/s 14 shall have effect from the date of this order till the completion of corporate insolvency resolution process or until this Bench approves the resolution plan under subsection (1) of Section 31 or passes an order for liquidation of corporate debtor under section 33 as, the case may be, prohibiting the following:

- (i) *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;*
- (ii) *Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;*
- (iii) *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 (54 of 2002);*
- (iv) *The recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate debtor.*

It is further directed that:

- (i) *The supply of essential goods or services to the corporate debtor as may be specified shall not be*

terminated or suspended or interrupted during the moratorium period

- (ii) *The provision of sub-section (1) shall not apply to such transaction as may be notified by the Central Government in consultation with any financial sector regulator*

Mr. Mahendra Prakash Khandelwal , Registration Number IBBI/IPA-002/IP-N00446/2017-2018/11275 is appointed as Interim Resolution Professional(IRP).

The IRP shall comply with the Provision of Section 13(2), 15,17 &18 of the Code. Further, the Directors, Promoters or any person associated with the Management of the Corporate Debtor are directed to co-operate to the IRP as prescribed under Section 19 and for discharging his function under a provision of section 20 of the Code. The Registry is further directed to communicate this order to Financial Creditor and Corporate Debtor and IRP through email and speed post.

List on DT 15.10.2018 for the filing of the progress report.

(Ms. Saroj Rajware)

(V.P Singh)

Member (Technical)

Member(Judicial)

Dated 19.09.2018