

IN THE NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI, COURT-III

(IB)-100(ND)/2023

Under Section 7 of the Insolvency and Bankruptcy Code, 2016, read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

IN THE MATTER OF:

M/s. CORREO MARKETINGS PRIVATE LIMITED Financial Creditor

VERSUS

M/s. ELEGANT IT SOLUTIONS PRIVATE LIMITED & 2 Ors.

1. M/s. Elegant It Solutions Private Limited

2. Mr. Rakesh Garg

Director of M/s. Elegant It Solutions Private Limited

3. Mr. Rishabh Jain

Director of M/s. Elegant It Solutions Private Limited

..... Corporate Debtors

Order delivered On: 10.01.2024

CORAM:

SHRI BACHU VENKAT BALARAM DAS

HON'BLE MEMBER (JUDICIAL)

SHRI ATUL CHATURVEDI

HON'BLE MEMBER (TECHNICAL)

PRESENT:

For Applicant : Mr. Anupam Lal Das, Sr. Adv., Mr. Manav P., Ms. Manasi, Mr. Anirudh Singh, Mr. Aditya Singh, Advs.

For Respondents : Mr. Vipin Garg, Mr. Arun Agarwal, Mr. Abhishek Aggarwal, Mr. Ankit Kumar, Advs.

ORDER

PER: ATUL CHATURVEDI, MEMBER (TECHNICAL)

1. This Application has been filed by M/s. Correo Marketings Private Limited, the Applicant before this Adjudicating Authority under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("IBC" or "Code") r/w Rule

(IB)-100(ND)/2023

Date of Order: 10.01.2024

Page 1 of 7



4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, (“Adjudicating Authority Rules”), for initiating the Corporate Insolvency Resolution Process (“CIRP”), declaring moratorium and for appointment of Interim Resolution Professional (“IRP”), against M/s. Elegant It Solutions Private Limited, the Respondent No. 1 on the ground that the Corporate Debtor has defaulted/failed to clear the outstanding principal amount of a sum of Rs. 3,52,74,800/- (Rupees Three Crore Fifty Two Lakh Seventy Four Thousand and Eight Hundred Only) and Rs. 63,54,442/- (Rupees Sixty Three Lakh Fifty Four Thousand Four Hundred and Forty Two Only) as interest till 31.03.2022, totalling to Rs. 4,09,93,798/- (Rupees Four Crore Nine Lakh Ninety Three Thousand Seven Hundred and Ninety Eight Only).

2. The Financial Creditor has alleged that the Corporate Debtor had taken loans from the Financial Creditor during the period from 22.07.2009 till 31.03.2022 for a total amount of Rs. 4,09,93,798/- out of which the Principal Amount is Rs. 3,45,93,000/- and interest @ 6% per annum is Rs. 64,00,798/- exclusive of TDS till 31.03.2022, towards advances/loan given to the Corporate Debtor.
3. The Applicant Company on 19.12.2022, issued a legal notice dated 12.12.2022 to the Corporate Debtor to the registered address of the Corporate Debtor available in MCA Master data. The same notice was returned as unserved.
4. It is submitted by the Applicant Company that the Lease Deed of the immovable property of the Corporate Debtor is cancelled by the relevant authorities due to default of payments by the Corporate Debtor. The Corporate Debtor has filed a Writ Petition (C) No. 8459 of 2022 before the Hon'ble Allahabad High Court which was disposed-off vide order dated 29.11.2022.
5. The Financial Creditor has placed on record of Financial Information (Form-C) available with the Information Utility (NeSL). The legal notice dated 12.12.2022, sent via email on 05.01.2023 seeking payment of outstanding debt of Rs. 4,09,93,798/-.



6. It is stated by the Applicant Company that the date of default was 31.03.2022. The legal notice dated 12.12.2022 (sent via email on 05.01.2023) seeking payment of the defaulted amount provided 15 day notice period from the date of issuance of the notice and accordingly the last date of default would be 21.01.2023.
Hence, the present application.
7. The Corporate Debtor No. 1 i.e. M/s. Elegant IT Solutions Private Limited in its reply affidavit has submitted that the Authorized Representative of the Applicant Company is one of the related parties under the common management in terms of the provisions of Section 5(24) of IBC and promoter company of the Corporate Debtor No. 1 i.e. M/s. Elegant IT Solutions Private Limited and both companies are controlled by the same Directors.
8. It is evident from the audited balance sheet for FY 2020-21 & FY 2021-22 that the balance sheet bears the signature of Mr. Sarish Chaudhary (DIN: 00085707) and Smt. Anita Gupta (DIN: 00786689). Mr. Sarish Chaudhary resigned from the Directorship of Corporate Debtor No. 1 Company on 04.05.2022 and currently serving as a Director of the Applicant Company from 01.06.2009. Smt. Anita Gupta resigned from the Directorship of Corporate Debtor No. 1 Company on 31.01.2018 and currently serving as a Director of the Applicant Company from 01.06.2009.
9. It is the case of the Respondent that the Authorized Representative of the Applicant Company i.e., Mr. Sarish Kumar Chaudhary and CA Sunil P. Gupta (himself or through his wife Smt. Anita Gupta), has been controlling the management and managing the affairs of the Corporate Debtor as its Directors and thereafter it was led by Mr. Sarish Kumar Chaudhary and by Mr. Adi Narayan Gupta who were responsible for inter-alia managing the accounts and finances, operating bank accounts and all other day to day operations of the Corporate Debtor.
10. The Corporate Debtor also raised various contentions about the nature of the transaction between the Applicant Company and the Corporate



Debtor and submitted that no evidence has been placed on record to show that there is any financial debt. Further, the remittance between the Financial Creditor and the Corporate Debtor was technically accounted as unsecured loans and it is a case of round-tripping.

11. The Corporate Debtor has further submitted that the Applicant Company is NBFC and there is no written loan agreement between the parties as per the RBI Regulations. Therefore, it cannot be said that any loan was extended to the Corporate Debtor.
12. It is the case of the Corporate Debtor that the Directors of the Respondent Company i.e., Mr. Rakesh Garg and Mr. Rishabh Jain have been working hard to restore the said IT Plot back to the Respondent Company which is evident from the proceedings before the Hon'ble Allahabad High Court, wherein the Hon'ble High Court directed the Revisional Authority to decide the Revision Petition filed by the Respondent Company. After continuous and diligent efforts by the present management, the IT Plot has recently been restored back to the Respondent Company by the Uttar Pradesh Government (Industrial Development Section-4, Lucknow) vide order dated 03.05.2023 in Revision Proceedings Case No 2589/77-4-23-15 Appeal/2022.
13. We have heard the submissions made by the Ld. Counsel appearing for the Applicant as well as the Ld. Counsel appearing for the Corporate Debtors and perused the records.
14. The Applicant in order to substantiate its case has relied upon the legal notice dated 12.12.2022 which was sent on 05.01.2023 through email, and also the record of Financial Information (Form-C) available with the Information Utility (NeSL).
15. The following issues emerge for Consideration:
 - a) Whether Directors of the Applicant Company are related parties in terms of Section 5(24) of IBC and
 - b) Whether execution of a written loan agreement is necessary between the parties in case one of the party is NBFC.

16. Related Party

- a) It is a trite law that the company once incorporated, holds a separate legal entity in the eyes of law where the company acts under its own name, has a seal of its own and sues or gets sued in the same manner as an individual. A company is governed by the Board of Directors who are primarily responsible for managing the affairs of the Company.

From the records, it is evident that the Authorized Representative of the Applicant Company i.e., Mr. Sarish Kumar Chaudhary and CA Sunil P. Gupta (himself or through his wife Smt. Anita Gupta) has been controlling the management and managing the affairs of the Corporate Debtor as its Directors.

- b) For better appreciation Section 5(24) of the IBC, 2016 is reproduced below for ready reference:

5. In this Part, unless the context otherwise requires,—

(24) "related party", in relation to a corporate debtor, means—

(a) a director or partner of the corporate debtor or a relative of a director or partner of the corporate debtor;

(h) any person on whose advice, directions or instructions, a director, partner or manager of the corporate debtor is accustomed to act;

- c) In view of the factual position that the Authorized Representative of the Applicant Company i.e., Mr. Sarish Kumar Chaudhary and CA Sunil P. Gupta (himself or through his wife Smt. Anita Gupta) has been controlling the management and managing the affairs of the Corporate Debtor as its Directors. We are of the considered view that the Authorized Representative of the Applicant Company is one of the related parties under the common management in terms of the provisions of Section 5(24) of IBC.

17. Written Loan Agreement

- a) We find that there was no written agreement between the parties. It was the contentions of the Corporate Debtor that the Financial




Creditor is an NBFC. We find that the NBFC is bound by the Master Circular issued by the Reserve Bank of India (“RBI”). It is an admitted fact that the Financial Creditor is an NBFC registered with the Reserve Bank of India and was not disputed by the Ld. Counsel arguing on behalf of the Financial Creditor during the course of the hearing. Admittedly, the Financial Creditor is bound by the Master Circular issued by the RBI (RBI guidelines on “Master Circular-Fair Practices Code for NBFCs, dated July 01, 2015,”) which envisages that:

“2A(ii) Loan appraisal and terms/conditions: The NBFCs should convey in writing to the borrower in the vernacular language as understood by the borrower by means of sanction letter or otherwise, the amount of loan sanctioned along with the terms and conditions including annualised rate of interest and method of application thereof and keep the acceptance of these terms and conditions by the borrower on its record. As complaints received against NBFCs generally pertain to charging of high interest/penal interest, NBFCs shall mention the penal interest charged for late repayment in bold in the loan agreement.”

b) We are of the considered view that an explicit written agreement of loan is mandatory for the Financial Creditor being a NBFC in order to substantiate the nature of transactions between the lender and borrower. In the present case, the Financial Creditor has not been able to produce any loan agreement with the Corporate Debtor. Therefore, in the absence of a written agreement, we are unable to ascertain the loan terms, date of repayment, and rate of interest, if any agreed upon. In the absence of a proper confirmation by the Corporate Debtor acknowledging the debt as ‘Financial Debt’, we are unable to conclude the said amount to have been advanced as Financial Debt within the meaning of Section 5(8) of IBC, 2016.

18. The Corporate Debtor has questioned the correctness of the record of Financial Information (Form-C) available with the Information Utility (NeSL) and submitted that no Record of Default with Information Utility



in Form-D has been furnished in terms of Regulation 21(4) of IBBI (IU) Regulations 2017, which is a requirement as per Section 7(3)(a) of IBC.

- 19.** On perusal of the Financial Information in Form-C of the Corporate Debtor maintained by the Information Utility namely National E-Governance Services Limited (NESL) dated 04.01.2023, we find that the mere filing of record of Financial Information in Form-C with the Information Utility (NeSL) does not constitute the record of default. Therefore, we are satisfied that there exists no debt and there is no default on the part of the Corporate Debtor.
- 20.** We are of the opinion that the Applicant Company is not a Financial Creditor holding any financial debt which is in default of payment by the Corporate Debtor. Therefore, we are satisfied that there exists no debt and no default and the same is corroborated by the averments made within the application. It is therefore clear that the Corporate Debtor has been able to raise a plausible contention regarding that the Corporate Debtor is not in default in respect of the debt due and payable. We therefore hold that the present application is not maintainable and devoid of merits.
- 21.** In light of the above facts and circumstances, we are satisfied that the present Applicant fails to fulfill the criteria under Section 7 of the Code. It is accordingly ordered as follows:
- i.** The Application bearing **(IB)-100(ND)/2023** filed by the Applicant under Section 7 of the Code read with Rule 4 of the Adjudicating Authority Rules for initiating CIRP against the Respondents is **dismissed**.
 - ii.** The Registry is directed to send a copy of this order to the Insolvency and Bankruptcy Board of India for their record.
No order as to costs.

Sd/-
(ATUL CHATURVEDI)
MEMBER (TECHNICAL)

Sd/-
(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)