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IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA

C.P. (IB) No. 1582/KB/2019

IN THE MATTER OF:

An application under Section 7 of the Insolvency and Bankruptcy Code 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to adjudication Authority) Rules, 2016;

And

IN THE MATTER OF:

P M Cold Storage Pvt. Ltd. having Registered office at 1A, Madan Mohan Burman Street, Kolkata - 700007, West Bengal, India.

.....Financial Creditor / Applicant.

Versus

IN THE MATTER OF:

Goouksheer Farm Fresh Pvt. Ltd., having its registered office at 63/3B, Sarat Bose Road, 5th Floor, Kolkata-700025, West Bengal, India.

....Respondent / Corporate Debtor.

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CORAM:

Shri M. B. Gosavi., Member (Judicial)

Shri V.K. Gupta, Member (Technical)

COUNSELS ON RECORD:

1. Ms. Mamta Binani, Adv.
2. Mr. Rohit Sharma, PCS } .... For the Corporate Debtor
3. Mr. Vijay Nath Jha, Adv.

1. Mr. Chayan Gupta } ..... For the Financial Creditor
2. Mr. Anujit Moopherji

Date of pronouncement of order: _____/12/2019

O R D E R

Per Shri V.K. Gupta, Member (Technical)

The Ld. Counsel appearing on behalf of the Financial Creditor contended that a loan of Rs. 50,00,000/- was given to the Corporate Debtor on 19th January, 2017. In this regard, he drew our attention to page 28 of the paper book are contained copy of bank statement and entry of disbursement of loan. It was

contended that the Financial Creditor was not an NBFC and it was an instance of friendly inter corporate loan based upon mutual understanding and written agreement had also not been executed.

2. It was also pleaded that the Financial Creditor sent a notice under Section 8 of IBC, 2016 inadvertently and, in fact, it was a notice of recall / demand. No reply was given by the Corporate Debtor. The Ld. Counsel further pleaded that there was a debt due and payable and a default had occurred in payment thereof, hence, condition of section 7 existed. Consequently this petition are likely to be admitted.

3. The Ld. Counsel for the Corporate Debtor appeared and submitted that it was not a case of loan but was given for purchase of material from the Corporate Debtor, hence, the status of the petitioner as Financial Creditor was in itself not tenable. In support of her such claim, she drew our attention to page 19 of the Petition containing ledger account of the Corporate Debtor in the books of Financial Creditor and submitted that narration of payment showed that it was a case of advance. She further argued that no written agreement existed, no promisory note or PDC or other security had been provided and these facts also supported

her claim that it was not a case of loan. She also pleaded requirements of Sections 186 of the Companies Act, 2013 were also not complied as no Board Resolution had been passed. Thereafter, she drew our attention to various pages of the petition as well as of the documents to show that there was inconsistency and contradiction as regards the date of default and date of payment due i.e. whether it was 31st March, 2017 or 31st March, 2019. She also submitted that the name of the IRP had not been proposed which was an incurable defect, hence, for this reason alone, the petition was liable to be dismissed.

4. It was also pleaded that petition was not maintainable for the reason that the name of the Corporate Debtor had already been struck off from Register of Companies and did not exist in law. It was also pleaded that notice under Section 8 had been issued, hence, this fact also supported her contention that it was a case of advance.

5. In the rejoinder, the Ld. Counsel for the Financial Creditor submitted that there were typographical mistakes but the fact that disbursement of loan was not at all in dispute. It was also not in dispute that the amount had been payable and the only defence

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had been take by Corporate Debtor was in regard to nature of loan.

6. The Ld. Counsel submitted that proceedings under IBC could be initiated against the struck of companies as well. For this proposition he raised on following two decisions of the Hon'ble NCLAT.

7. The Ld. Counsel submitted that he will file supplementary affidavit to rectify the defect of not proposing IRP by proposing the same along with consent of competent professional to act as IRP.

8. We have considered view that the submissions made by both the sides and also perused the material on record.

9. As far as issue of meeting out of obligations of proposal of name of IRP is concerned, we allow the Financial Creditor to propose the name of a qualified personnel to act as such.

10. Hence, this plea of the Corporate Debtor stands rejected.

11. As regard to the other contentions regarding different dates mentioned at various places. We are of the view that these are of

technical nature and do not impact the maintainability of the petition filed under Section 7 of the IBC, 2016.

12. As regard to non submission of Board Resolution under Section 186 of the Companies Act, 2013, we hold that this plea is also devoid of merit in view of the provisions of Sections 238 of the IBC, 2013 and there being no such requirement under the provisions of IBC, 2016.

13. As regard to nature of debt that is whether it is a financial debt or operational debt, we carefully perused the ledger account, copy of which has been placed at page 19 of the paper book. The narration given therein reads as "being amount paid towards loan and advances". The Corporate Debtor is trying to read only the words "Advances", hence, we find no substance in her contention that it was a case of advance and not of loan especially when she has not brought any material on record to support her contention that it was a case of advance for purchase of goods. Similarly at other places the word loan conjunction with advance has been used. We are further of the view that absence of PDC or any written agreement does not alter the character of the transaction and other facts and material can establish the true nature of transaction.

14. As regard to the aspect of maintainability of proceedings against a stuck off company we find that the Hon'ble NCLAT has held that proceedings against struck off company under Section 7 IBC, 2016 were valid. The relevant findings of the order of the Hon'ble NCLAT are reproduced as under:

It was further submitted that the application under Section 7 preferred by 1st Respondent Bank - Financial Creditor was barred by limitation.

4. Learned Counsel appearing on behalf of the Appellant submitted that in view of the initiation of 'Corporate Insolvency Resolution Process', now, the 'Resolution Professional' will ask the Appellant, Ex-Director and others to handover the records and assets of the 'Corporate Debtor' which are not available. However, in absence of any such order passed by the 'Resolution Professional' or the Adjudicating Authority (National Company Lay Tribunal), Mumbai Bench, we are not inclined to decide such issue.

5. Learned Counsel for the Appellant also submitted that Company is non-functional since number of years and there is no employee working in company and even assets are not there. Therefore, according to hi, the 'Resolution Professional' cannot make the 'Corporate Debtor' a going concern. Therefore, the application under Section 7 is not maintainable. However, on the ground that there is no employee working, or the Shareholder(s) or Director(s) ceased to be Shareholder (s) or Director(s), cannot be a ground to reject application under Sections 7 or 9 of the I & B Code.

6. The question arises for consideration is whether an application under Section 7 or 9 for initiating 'Corporate Insolvency Resolution Process' is maintainable against a Company/'Corporate Debtor', if the name of the Company/'Corporate Debtor' is struck-off from the Register of the Companies.

7 . For deciding the issue, it is necessary to refer the relevant provisions of the Companies Act, 2013, as also the reasons and manner in which the name of a Company is struck-off.

8. Chapter XVIII of the Companies Act deals with "Removal of Names of Companies from the Register of Companies". The Registrar of Companies is empowered under Section 248 of Companies Act to remove the name of

the Company from the Register of the Companies, which reads as follows:-
"CHAPTER XVIII

REMOVAL OF NAMES OF COMPANIES FROM THE REGISTER OF COMPANIES 248. Power of Registrar to remove name of company from register of companies.--(1) Where the Registrar has reasonable cause to believe that-- (a) a company has failed to commence its business within one year of its incorporation; [or]

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(c) a company is not carrying on any business or operation for a period of two immediately preceding financial years and has not made any application within such period for obtaining the status of a dormant company under section 455, he shall send a notice to the company and all the directors of the company, of his intention to remove the name of the company from the register of companies and requesting them to send their representations along with copies of the relevant documents, if any,within a period of thirty days from the date of the notice.

(2) Without prejudice to the provisions of sub-section (1), a company may, after extinguishing all its liabilities, by a special resolution or consent of seventy-five per cent members in terms of paid-up share capital, file an application in the prescribed manner to the Registrar for removing the name of the company from the register of companies on all or any of the grounds specified in sub-section (1) and the Registrar shall, on receipt of such application, cause a public notice to be issued in the prescribed manner: Provided that in the case of a company regulated under a special Act, approval of the regulatory body constituted or established under that Act shall also be obtained and enclosed with the application.

(3) Nothing in sub-section (2) shall apply to a company registered under section 8.

(4) A notice issued under sub-section (1) or sub-section (2) shall be published in the prescribed manner and also in the Official Gazette for the 06-12-2019 (Page 2 of 6) www.manupatra.com National Company Law Tribunal information of the general public.

(5) At the expiry of the time mentioned in the notice, the Registrar may, unless cause to the contrary is shown by the company, strike off its name from the register of companies, and shall publish notice thereof in the Official Gazette, and on the publication in the Official Gazette of this notice, the company shall stand dissolved.

(6) The Registrar, before passing an order under sub-section (5), shall satisfy himself that sufficient provision has been made for the realisation of all amount due to the company and for the payment or discharge of its

liabilities and obligations by the company within a reasonable time and, if necessary, obtain necessary undertakings from the managing director, director or other persons in charge of the management of the company: Provided that notwithstanding the undertakings referred to in this sub-section, the assets of the company shall be made available for the payment or discharge of all its liabilities and obligations even after the date of the order removing the name of the company from the register of companies.

(7) The liability, if any, of every director, manager or other officer who was exercising any power of management, and of every member of the company dissolved under sub-section (5), shall continue and may be enforced as if the company had not been dissolved.

(8) Nothing in this section shall affect the power of the Tribunal to wind up a company the name of which has been struck off from the register of companies"

9. As per sub-section (6) of Section 248, before passing an order under sub-section (5) (removing the name from the Register of Companies), the Registrar is to satisfy himself that sufficient provision has been made for realization of all amount due to the company and for the payment or discharge of its liabilities and obligations within a reasonable time and, if necessary, obtain necessary undertakings from the Managing Director, Director or other persons in charge of the management of the Company.

10. As per proviso thereof, notwithstanding the undertakings referred to in sub- section (6), the assets of the Company are to be made available for payment or discharge of its liabilities and obligations even after the date of the order removing the name of the Company from the Register of Companies.

11. From sub-section (7) of Section 248, it is also clear that the liability, if any, of every director, manager or other officer who was exercising any power of management, and of every member of the company dissolved under sub-section (5) of Section 248, shall continue and may be enforced as if the company had not been dissolved.

12. From sub-section (8) of Section 248, it is clear that Section 248 in no manner will affect the power of the Tribunal to wind up a company, the name of which has been struck off from the Register of Companies.

13. Section 250 of the Companies Act, 2013 relates to effect of Company notified as dissolved and reads as follows:-

"250. Effect of company notified as dissolved.--Where a company stands dissolved under section 248, it shall on and from the date mentioned in the notice under sub-section (5) of that section cease to operate as a

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company and the Certificate of Incorporation issued to it shall be deemed to have been cancelled from such date except for the purpose of realizing the amount due to the company and for the payment or discharge of the liabilities or obligations of the company."

14. Therefore, it is clear that after removal of the name of the Company from the Register of the Company for the purpose of right of realization of all amount due to the Company and for the purpose of payment or discharge of its liabilities or obligations of Company continues.

15. Section 252 relates to 'Appeal to Tribunal' against order of Registrar, notifying a Company as dissolved under Section 248. As per Section 252(3), if a Company, or any member or creditor or workman thereof feels aggrieved by the Company having its name struck off from the Register of Companies, the Tribunal on an application made by the Company, member, creditor or workman before the expiry of twenty years from the publication in the Official Gazette of the notice under sub-section (5) of section 248, may, if satisfied that the Company was, at the time of its name being struck off, carrying on business or in operation or otherwise it is just that the name of the Company be restored to the Register of Companies, order the name of the Company to be restored to the Register of Companies, and the Tribunal may, by the order, give such other directions and make such provisions as deemed just for placing the Company and all other persons in the same position as nearly as may be as if the name of the Company had not been struck off from the Register of Companies.

Section 252(3) reads as follows:-
"252. Appeal to Tribunal.--

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(3) If a company, or any member or creditor or workman thereof feels aggrieved by the company having its name struck off from the register of companies, the Tribunal on an application made by the company, member, creditor or workman before the expiry of twenty years from the publication in the Official Gazette of the notice under sub-section (5) of section 248, may, if satisfied that the company was, at the time of its name being struck off, carrying on business or in operation or otherwise it is just that the name of the company be restored to the register of companies, order the name of the company to be restored to the register of companies, and the Tribunal may, by the order, give such other directions and make such provisions as deemed just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off from the register of companies."

16. From sub-section (3) of Section 252, it will be evident that the Tribunal, by the order, before expiry of twenty years from the publication

in the Official Gazette of the Notice under sub-Section (5) of Section 248, on an application made by a creditor or workman, may pass order and give such other directions and make such provisions as deemed just for placing the name of the Company and all other persons in the same position as nearly as may be as if the name of the Company had not been struck off from the Register of Companies.

17. The Tribunal is the Adjudicating Authority in terms of Section 60(1) of the I & B Code. Hence, on one side it plays role of 'Adjudicating Authority' and on the other 'Tribunal' under the Companies Act. Therefore, if an application is filed by the 'Creditor' ('Financial Creditor' or ('Operational Creditor') or workman ('Operational Creditor') before the expiry of twenty years from the publication in the Official
Gazette of the Notice under sub-section (5) of Section 248, it is open to the Adjudicating Authority to give such directions and make such provisions as deemed just for placing the name of the Company and all other persons in the same position nearly as may be as if the name of the Company had not been struck off from the Register of Companies.

18. As per amended Clause (94-A) of Section 2 of the Companies Act, 2013 "winding up" means 'winding up under this Act or liquidation under the Insolvency and Bankruptcy Code, 2016, as applicable'. Therefore, it is clear that the Company, whose name has been removed from the Register of the Companies can be liquidated under the I & B Code.

19. In terms of Part II of I & B Code, for the purpose of liquidation, except 'Voluntary Liquidation of Corporate Persons' under Section 59 of the I & B Code, procedure of 'Corporate Insolvency Resolution Process' is to be followed, if a proceeding is
initiated under Sections 7 or 9 of the I & B code. Instead of liquidation, the first step to be taken is to ensure that in a time bound manner the value of assets of Corporate Debtor/Company is maximized and to promote entrepreneurship, availability of credit by balancing the interest of all the stakeholders; within an active legal framework for timely resolution of insolvency and bankruptcy. Liquidation of assets of the 'Corporate Debtor'/Company is not the object, but object is revival and rehabilitation of the 'Corporate Debtor'/Company by way of 'Resolution' and maximization of the value of assets of the 'Corporate Debtor' and balancing the interest of all the stakeholders.

20. The name of the 'Corporate Debtor' (Company) may be struck-off, but the assets may continue. Whether in the present case, there are assets of the 'Corporate Debtor' or not can be looked into only by the 'Interim Resolution Professional'/'Resolution Professional'.

21. The name of the Company having been struck-off, the Corporate Person cannot file an application under Section 59 for Voluntary Liquidation. In such a case and in view of the provisions of Section 250(3) read with Section 248(7) and (8), we hold that the application under

Sections 7 and 9 will be maintainable against the 'Corporate Debtor', even if the name of a 'Corporate Debtor' has been struck-off.

22. So far as, liability of the Ex-Directors or Shareholders or Officers are concerned, Section 248(7) of the Companies Act being clear, we are not expressing specific opinion, till any order is passed by the Adjudicating Authority or demand is made by the 'Interim Resolution Professional'.

23. In view of the aforesaid provision, we hold that the Adjudicating Authority who is also the Tribunal is empowered to restore the name of the Company and all other persons in their respective position for the purpose of initiation of 'Corporate Insolvency Resolution Process' under Sections 7 and 9 of the I & B Code based on the application, if filed by the 'Creditor' ('Financial Creditor' or 'Operational Creditor') or workman within twenty years from the date the name of the Company is struck off under sub-section (5) of Section 248. In the present case, application under Section 7 having admitted, the 'Corporate Debtor' and its Directors, Officers, etc. deemed to have been restored in terms of Section 252(3) of the Companies Act.

15. Thus, having regard to the above findings and other decisions of the Hon'ble NCLAT wherein the findings given in the aforesaid decision have been followed. We hold that CIRP can be initiated against s struck off company.

16. The Financial Creditor in the supplementary affidavit has proposed the name of the IRP who has given his consent and it has been claimed that no disciplinary proceedings are pending against him, hence, we approve his name.

17. We also direct IRP / RP to file an application under Section 252(3) of the Companies Act, 2013 and serve the copy of the same to Registrar of Companies, West Bengal so that name of the struck

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off company can formally be restored by an appropriate order of the Tribunal.

18. This Petition is otherwise complete and defect free. Hence, we admit the same and order as under:

ORDER

i. The petition filed by the Financial Creditor under Section 7 of the Insolvency & Bankruptcy Code, 2016 is hereby admitted for initiating the Corporate Insolvency Resolution Process in respect of the Corporate Debtor namely Goouksheer Farm Fresh Pvt. Ltd.

ii. We hereby declare a Moratorium and public announcement in accordance with Sections 13 to 15 of the IBC, 2016.

iii. The moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The IRP shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Section 15. The public announcement referred to in clause (b) of sub-section (1) of

Section 15 of the Insolvency & Bankruptcy Code, 2016 shall be made immediately.

iv. Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:

a) The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;

b) Transferring, encumbering, alienating or disposing of by the corporate debtor 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 Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

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

v. 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.

vi. 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.

vii. The order of moratorium shall have effect from the date of admission till the completion of the Corporate Insolvency Resolution Process.

viii. 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 Sec.31 or passes an order for liquidation of corporate debtor under Sec.33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

ix. Necessary public announcement as per Section 15 of the IBC, 2016 may be made.

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x. Mr. Sanjeev Jhunjhunwala, with address at Siddha Weston, 9 Weston Street, Suit No. 134, Kolkata 700 013 and Registration No. IBBI/IPA-001/IP-P00325/ 2017-18/ 10595 is hereby appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a meeting of Committee of Creditors for evolving a resolution plan.

xi. The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors and shall identify the prospective Resolution Applicant within **105 days** from the insolvency commencement date.

xii. The IRP is directed to see that Regulation 40A of IBBI (IRP for Corporate Persons) Regulations, 2016 is complied strictly and file progress report in terms of compliance of the Regulation.

xiii. The Applicant/Financial Creditor is directed to deposit Rs. 50,000/-(Rupees Fifty Thousand only) in the ESCROW Account in SBI to be operated though the Registrar, NCLT, Kolkata Bench, for the purpose of meeting the preliminary expenses for initiating the CIR Process by the IRP, as per

Regulation 33(3) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

xiv. Registry is hereby directed under Section 7(7)(a) of the I.B. Code, 2016 to communicate the order to the Financial Creditor, the Corporate Debtor and to the Interim Resolution Professional by Speed Post as well as through e-mail.

19. List the matter on 06.02.2020 for filing of progress report.

20. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

13/12/2019

(V.K. Gupta)
Member (Technical)

13/12/2019

(M.B. Gosavi)
Member (Judicial)

Signed on this, the 13th day of December, 2019.

M_Jana_Steno.