

IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH, BENGALURU
(Exercising powers of Adjudicating Authority under
The Insolvency and Bankruptcy Code, 2016)

C.P. (IB) No.27/BB/2022
Under Section 7 of the IBC, 2016
r/w Rule 4 of the I&B (AAA) Rules, 2016

IN THE MATTER OF:

DMI FINANCE PRIVATE LIMITED

Express Building, 3rd Floor,
9-10, Bahadur Shah Zafar Marg,
New Delhi-110002... Financial Creditor

VERSUS

HOYSALA PROJECTS PRIVATE LIMITED

No.104, Ground Floor, Infantry Technopark,
Infantry Road,
Bangalore-560001... Corporate Debtor

Order delivered on 28th March 2023

Coram: 1. Hon'ble Justice (Retd) T Krishnavalli, Member (Judicial)
2. Hon'ble Shri Manoj Kumar Dubey, Member (Technical)

PRESENT:

For the Petitioner : Shri. Ajay Kohli a/w Shri Shubham A. Misra, Advs.

For the Respondent : Shri A. Murali a/w Shri Abhijith, Advs.

ORDER

Per: Manoj Kumar Dubey, Member (Technical)

1. This present Company Petition has been filed on 10.11.2021 by **DMI Finance Private Limited** (for brevity 'Financial Creditor') under Section 7 of the IBC, 2016, r/w Rule 4 of the I&B (Application to Adjudicating Authority) Rules, 2016 with a prayer to initiate Corporate Insolvency Resolution Process (CIRP) against **Hoysala Projects Private Limited** (hereinafter called as 'Corporate Debtor'), on the ground that it has

committed default for total amount of Rs.2,00,80,418/-(Rupees Two Crore Eighty Thousand Four Hundred and Eighteen only) as on 15.09.2021.

2. Brief facts of the case, as mentioned in the Petition, which are relevant to the issue in question, are as follows:

- I.** It is stated that the Corporate Debtor acting through its Directors approached the Financial Creditor seeking grant of a loan facility. In consideration of the representation made by the Corporate Debtor, in respect of the adherence of the terms of the repayment as well as compliance of the terms, conditions and covenants concerning the said loan, the financial creditor granted a loan in the sum of Rs.21,00,00,000/-(Rupees Twenty One Crores only), in favour of the Corporate Debtor, vide loan agreement dated 14.05.2019 and the date of disbursement being 24.05.2019.
- II.** It is submitted that Mr.Sateesh Tirumali Srirangachar, director of the Corporate Debtor and Ms.Hinal Tirumali Sateesh, stood at Guarantors for and on behalf of the Corporate Debtor, thereby guaranteeing inter alia the due repayment of the said Loan Facility. The repayment of the loan facility was/ is secured inter-alia by way of creation of “first and exclusive charge by way of mortgage of the projects and project land”; creation of “first and exclusive charge by way of hypothecation over the projects receivables and moveable and current assets, including plant and machinery, pertaining to the projects and escrow account.
- III.** Further it is stated that, as one of the security stipulations envisaged in the afore referred loan agreement and the schedules appended thereto, it was imperative for the Corporate Debtor to ensure that the “project receivables”; which means and includes all amounts generated from time to time, in respect of each project inter alia from sale ,lease, sub lease of any saleable area/ units called by whatever name, which is collected from the purchasers/ end users of such units/ saleable area; are deposited in the designated Escrow Account , subject to the applicable laws/ provisions of RERA.

- IV.** The tenure of the said loan was / is 48 months from the date of first draw down i.e. 24.05.2019 and the repayment of the said loan was/ is to be made by the Corporate Debtor to the Financial Creditor post expiry of the principal moratorium period; as and by way of 12 instalments, payable on quarterly basis on the applicable payment dates.
- V.** It is stated that there was/ is no moratorium period with respect to payment of interest obligation is concerned and accordingly the interest was/is payable on monthly basis, right from the inception of the loan transaction.
- VI.** The Corporate Debtor was/is bound to adhere to the terms of the repayment of the said loan. However, the corporate debtor has been making irregular payments in the past and has started defaulting in making the payment(s) of interest and principal instalments.
- VII.** As on 15th September 2021 a sum of Rs.2,00,80,418/- (Rupees Two Crores Eighty Thousand Four Hundred and Eighteen only) became “overdue” with respect to the said loan transaction, on account of defaults committed by the Corporate Debtor towards the payment of overdue instalments, besides penal and other interest.
- VIII.** It would be pertinent to highlight here that the “NCH/Electronic Funds Transfer” presented for collection, to its banker, by the Financial Creditor, towards realization of its part dues, could not be executed, on the ground of “Account Blocked or Frozen”.
- IX.** Accordingly, the Financial Creditor vide notice dated 07.10.2021, inter- alia called upon the Corporate Debtor to pay to the Financial Creditor the said sum of Rs.2,00,80,418/-, however all such demands have proved futile. The Corporate Debtor, failed/avoided/ neglected to comply with the said notice dated 07.10.2021.
- X.** Despite specific request and demands made by the Financial Creditor, the Corporate Debtor as well as the guarantors aforementioned, failed/avoided to repay the total outstanding dues in respect of the said loan transaction(s)

- XI.** The Corporate Debtor is liable to make a payment of Rs.2,00,80,418/- (Rupees Two Crores Eighty Thousand Four hundred Eighteen only) towards the overdue principle amounts, outstanding as on 15.09.2021, besides interest on the said amount, in respect of the aforementioned loan account, to the Financial Creditor.
- 3.** The Respondent/Corporate Debtor opposed the C.P., vide Diary No. 3250 dated 26.07.2022 and written submission vide diary no 684 dated 06.02.2023 by *inter alia* contending as under:
- (a)** The Financial Creditor is seeking for initiation of CIRP of the Corporate Debtor merely because of the delay caused in making payment for September, 2021 quarter, which is now admittedly have been paid. Amount in default as per the petition is Rs.2,00,80,418/- (Rupees Two Crore Eighty Thousand Four Hundred and Eighteen Only)(pg.8 of the Petition) which was towards September, 2021 quarter. The Corporate Debtor has duly paid September 2021 quarterly payment (Email dated 9.12.2021, 10.12.2021 at page 32-34 produced as Annexure E Colly of Statement of Objections).
- (b)** The Corporate Debtor has produced the Chartered Accountant certificate dated 15.10.2022 (Document No.1) vide memo dated 24.11.2022, which confirms that the Corporate Debtor has made payment towards interest and principal amount from the date of disbursement till the quarter ending June 30th 2022. The Corporate Debtor has also paid interest and principal repayment towards the September 2022 quarter. The payments towards the December 2022 quarter is pending and the same will be paid in due course. Admittedly, the loan account is standard and has not become NPA since the date of disbursement. The Corporate Debtor has also produced the Bank statement at page 11-18 Annexure C to the Statement of Objections.
- (c)** The instant petition is not maintainable since as on date there is no existence of a financial debt and default on the part of the Corporate Debtor in payment of the debt.

- (d)** The Financial creditor has vide rejoinder made additional claim towards delayed payment, additional interest and penal interest which was not part of the petition (relevant clause under the Loan Agreement is 2.8 Penal Interest, 2.9 Additional Interest at Pg.33 and 34 of the Petition. However the additional interest, delayed interest and penal interest is payable only if there is a demand and there has been no demand made to the Corporate Debtor prior to filing of the petition by the financial Creditor.
- (e)** As per the sanction letter and loan agreement, the Corporate Debtor has time till September 2023 to clear the loan and the Financial Creditor is misusing these proceedings to exert pressure on the Corporate Drbtor to premature pay the entire loan amount. Admittedly, the loan has not been recalled by the Financial Creditor till date as the Corporate Debtor has diligently cleared the quarterly instalments.
- (f)** Amount claimed in the petition and rejoinder is inconsistent and clearly disclose the mala fides of the Financial Creditor and NESL details filed by the Financial Creditor also confirms that payment towards the purported default amount as per the petition has been received by it.
- (g)** The Corporate Debtor being a solvent company and a going concern, which has various ongoing projects and employees working at its behest, it is unjust and unreasonable to initiate corporate debtor is solvent and has been doing business. The Corporate Debtor is financially healthy and viable company. Since there is no existing debt which is due and payable, there is no financial debt in the instant case.
- (h)** In the light of the Hon'ble Apex Court's decision in Vidarbha Industries Power Limited v. Axis Bank Limited reported in (2022) 8 SCC 352, this Hon'ble Tribunal has the discretion to not admit the instant petition especially in view of the fact that the purported default amount as per the petition is already cleared by Corporate

Debtor and the Financial Creditor has continued to received subsequent quarterly instalments.

- (i)** It is evident that the financial creditor has continued to receive the quarterly instalments even after filing the petition and in fact, the September 2021 quarterly payment was received by it even before notice was issued to the Corporate Debtor by this Tribunal and the Financial Creditor has intentionally concealed this material fact from this Tribunal. Therefore, this is also a fit case for this Tribunal to initiate proceedings against the Financial Creditor under Section 65 of the Insolvency and Bankruptcy Code, 2016.
 - (j)** The instant case is a fit case where the application deserves to be rejected since there is no existing debt and the same is evidenced from the records produced and available before this Tribunal. The Corporate Debtor is not bankrupt or insolvent. It is financially healthy and has repaid instalments due and payable from its end.
- 4.** The petitioner /financial creditor filed rejoinder vide Diary No.3948 dated 16.09.2022 and written submission vide diary no 664 dated 03.02.2023 by *inter alia* contending as under:
- I.** It is submitted that since the Corporate Debtor has failed to make payments of its Quarterly Instalment that became due and payable on 15.09.2021, the same constitutes and event of default as per Clause 8.1 of the Loan Agreement. The NeSL report filed on 23.11.2022 by the Financial Creditor also confirms the Default committed by the Financial Creditor.
 - II.** It is also pertinent to note that as per the admitted case of the Corporate Debtor, the payments with respect to the Instalment due on 15.09.2021 i.e., the date of default were made in part between 29.10.2021 and 10.12.2021 i.e., after the filing of the present petition. The petition was filed on 21.10.2021 (annexure C to the statement of objections filed by the Corporate Debtor).

- III.** Further , the Statement of dues as on 15.09.2021 depicts the total outstanding of the Corporate Debtor (including principal+ interest) and shows the total outstanding from Corporate Debtor to Financial Creditor to be 3,28,79,332.(Annexure X of the rejoinder dated 10.09.2022 pg 26). Admittedly, the Corporate Debtor has cleared the outstanding with respect to only the principal amount (that too after the filing of the petition) and the interest amount, penal interest etc. remains unpaid till date.
- IV.** The law with respect to the scope of enquiry of this Hon'ble Tribunal under section 7 of the Insolvency and Bankruptcy Code, 2016 ("the Code") has been laid down by the Supreme Court in the case of *Innoventive Industries Ltd v. ICICI Bank*,(2018) 1 SCC 407 ("Innoventive Judgement") wherein the Hon'ble Supreme Court has held that the moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete. In cases initiated under section 7 of the Code, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. Further, the Hon'ble Supreme Court in the said case has held that default as defined under section 3(12) in very wide and would also include "non-payment of even part thereof or an instalment amount.(paras.27,28 and 30 of the Innoventive Judgement).
- V.** It is the case of the Corporate Debtor that they have cleared all outstanding with respect to the subject Loan Agreement. Such claims of the Corporate Debtor are blatantly false and have been made to mislead this Tribunal.
- VI.** As already pointed out, the statement of dues as on 15.09.2021 depicts the total outstanding of the Corporate Debtor (including principal + interests) and shows the total outstanding from Corporate Debtor to Financial Creditor to be Rs.3,28,79,332.(Annexure X of the rejoinder dated 10.09.2022

pg.26).Admittedly, the Corporate Debtor has cleared the outstanding with respect to only the principal amount(that too after the filing of the petition) and the interest amount, penal interest etc. remains unpaid till date.

- VII.** Further, the Corporate Debtor has continued to default on its payments even on subsequent instalments and the total outstanding towards the subject Loan Agreement as on 15.12.2022 is Rs.5,80,68,004.(Copy of the statement of dues filed before this Tribunal dated 16.12.2022). the memo filed by the Corporate Debtor dated 24.11.2022, fails to capture the total outstanding of the Corporate Debtor, since the Corporate Debtor has deliberately failed to include the Penal Interest/Additional Interest components in the calculation of the total outstanding.
- VIII.** Therefore, even if it were relevant that the Corporate Debtor has made certain payments, subsequent to the initiation of the present proceedings, which the Financial Creditor fervently denies (as per Para 27.28 and 29 of the Innovative Judgment), the Corporate Debtor has only cleared part- dues and therefore the present petition deserves to be admitted.
- IX.** The Financial Creditor also seeks to place reliance on the judgment of the Hon'ble NCLAT in the matter titled as *Neha Himatsingks & Another v. Himatsingka Resorts Private Limited & Anr*, 2018 SCC Online NCLAT 784. ("Neha Himatsingka Judgment"). It is contended by the petitioner that the facts of the said case are somewhat similar to the facts of the captioned matter. In the said matter, the Corporate Debtor had made payments towards the principal debt dues to the Financial Creditor, after the institution of the matter under Section 7 of the Code and during the pendency of the proceedings under Section 7 before the NCLT Bench. The Learned NCLT Bench had rejected the application preferred by the Financial Creditor. However, in Appeal preferred by the Financial Creditor , the Hon'ble NCLAT set aside the order passed by the Learned NCLT and

held that since there is a debt payable by the Corporate Debtor to the Financial Creditor and the Corporate Debtor has defaulted to pay the same amount, it is a fit case for admission. It is further emphasized that the aforesaid judgment held that it was a fit case for “admission” of the Section 7 Petition, despite the plea of the Corporate Debtor that it made payments of the principal dues to the Financial Creditor during the pendency of the petition before the Learned NCLT Bench and has also issued post-dated cheques to the Financial creditor, towards the payment of interest (Para 20,31 & 32 of Neha Himatsingka Judgement.)

- X.** Therefore, even if certain payments were made by the Corporate Debtor subsequent to filing of the present petition, the same is irrelevant to the adjudication of the present case. It is an admitted case of the Corporate Debtor that is committed default with respect to the subject Loan Agreement and hence, the present petition deserves to be admitted.
- XI.** The Corporate Debtor in its statement of objections dated 26.07.2022 has miserably failed to make any averments as to why the present petition deserves to be rejected. The only averment that is falling from the Corporate Debtor is that the amount due has already been paid. The said averments are contrary to the factual matrix of the matter,
- XII.** Further, it is submitted that the Corporate Debtor has continuously defaulted in its obligation under the subject Loan Agreement, and the same is admitted by the Corporate Debtor in its Statement of Objection dated 26.07.2022.
- XIII.** The Corporate Debtor is clearly unable to fulfill its obligations under the subject Loan Agreement. There is otherwise no explanation for the Continuous defaults committed by the Corporate Debtor with respect to the subject Loan Agreement. Thus, it is submitted that the present case is a fit case for admission.

5. Heard learned Counsels for the Financial Creditor and for the Corporate Debtor. We have carefully perused the pleadings of the parties and extant provisions of the Code, and the Rules made there under.
6. While considering the application for initiation of CIRP of the Corporate Debtor under Section 7 of IBC, 2016, the Adjudicating Authority is required to take in to consideration that, whether there is debt and default occurred against the Corporate Debtor. The Hon'ble Supreme Court in *Vidarbha Industries Power Limited v. Axis Bank Limited*, the Adjudicating Authority might examine the expedience of initiation of CIRP, taking into account all relevant facts including the overall financial health of the Corporate Debtor in following words:

“77. On the other hand, in the case of an application by a Financial Creditor who might even initiate proceedings in a representative capacity on behalf of all financial creditors, the Adjudicating Authority might examine the expedience of initiation of CIRP, taking in to account all relevant facts and circumstances, including the overall financial health and viability of the Corporate Debtor. The Adjudicating Authority may in its discretion not admit the application of a Financial Creditor...”

7. It is also held that:

“...81. The title “Insolvency and Bankruptcy Code” makes it amply clear that the statute deals with and/or tackles insolvency and bankruptcy. It is certainly not the object of the IBC to penalize solvent companies, temporarily defaulting in repayment of its financial debts, by initiation of CIRP. Section 7(5)(a) of the IBC, therefore, confers discretionary power on the Adjudicating Authority (NCLT) to admit an application of a Financial Creditor under Section 7 of the IBC for initiation of CIRP.

8. The facts of the case in the Judgement submitted by the Petitioner in *Neha Himatsingks Resorts Private Limited & Anr, 2018 Sc Online NCLAT 784*, are distinguishable; since in that case, the NCLAT had set aside the case with a direction to the Adjudicating Authority to decide whether there is a 'Debt' and a 'Default' for admission of the case. On the other hand, in the present case, it is clear from the facts and documents submitted by both parties that there is no debt and default on the part of the Corporate Debtor, and there is only a delay in making quarterly payment for the

September 2021, which was paid by the Corporate Debtor between 29.10.2021 and 10.12.2021. The repayment in respect of the delayed amount has been admitted by the petitioner in the rejoinder filed vide diary no 3948 dated 16.09.2022. The amount as per the demand notice dated 7.10.2021 and the Form 1 is the same. The Financial creditor has not demanded the overdue interest and applicable charges of Rs.1,27,98,914/- at the time of filing the petition. Moreover, the loan account of the Corporate Debtor is standard and has not become NPA since the date of disbursement. As per the Sanction letter and the loan agreement, the respondent has time till September 2023 to clear the loan. The CA Certificate dated 15.10.2022 filed vide memo dated 24.11.2022, confirms that the corporate debtor has been making the payments of the instalments to the Financial Creditor towards interest & principal from the date of disbursement till the quarter ending 30th June 2022, with some delays. It is apparent that the Corporate Debtor is financially healthy and viable company.

9. In view of the above discussions and considering the material available on record and the judgments, decisions discussed above, we are of the considered view that the proceedings under Section 7 of the IBC, 2016 cannot be initiated against the Respondent M/s Hoysala Projects Private Limited, since delay in repayment of instalments cannot be considered as existence of 'Debt' and 'Default'.

10. Accordingly, C.P.(IB)No.27/BB/2022 is dismissed.

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**(MANOJ KUMAR DUBEY)
MEMBER (TECHNICAL)**

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**(KRISHNAVALLI)
MEMBER (JUDICIAL)**