

NATIONAL COMPANY LAW TRIBUNAL
INDORE BENCH
COURT NO. 1

ITEM No.2
(MP) CP(IB) 77 of 2020

Proceedings under Section 7 IBC

IN THE MATTER OF:

Kanak Fairdeal (India) Pvt Ltd
V/s
Alfavision Overseas (India) Ltd

.....Applicant

.....Respondent

Order delivered on 04/04/2024

Coram:

P. Mohan Raj, Hon'ble Member(J)
Kaushalendra Kumar Singh, Hon'ble Member(T)

PRESENT:

For the Applicant :
For the Respondent :

ORDER

The case is fixed for pronouncement of the order.

The order is pronounced in open Court *vide* separate sheet.

Sd/-

KAUSHALENDRA KUMAR SINGH
MEMBER (TECHNICAL)

A. Bhadauria

Sd/-

P. MOHAN RAJ
MEMBER (JUDICIAL)

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
INDORE BENCH**

CP(IB) 77 of 2020

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

In the Matter of:

Kanak Fairdeal (India) Private Limited

Through Amit Gupta
S/o Shri Brijmohan Gupta
340, Laxmi Plaza
Laxmi Industrial Estate
New Link Road, Andheri (W)
Mumbai-400058

Financial Creditor

Versus

Alfavision Overseas (India) Limited

405, Rajani Bhawan
569/2, M.G. Road
Indore-452001

Corporate Debtor

Order pronounced on: 04.04.2024

**Coram: Hon'ble P. Mohan Raj, Member (J)
Hon'ble Kaushalendra Kumar Singh, Member (T)**

Present:

For the Applicant: Ld. Adv. Mr. Rohit Dubey
For the Respondent: Ld. Sr. Adv. Mr. Ashok Chitale a.w.
Ld. Adv. Mr. Kartike Chitale

ORDER

1. The instant application was filed on 28.09.2020 by Kanak Fairdeal (India) Private Limited (Applicant) under Section 7 of the Insolvency and Bankruptcy Code, 2016 (**CODE**) read with Rule 4 of the Insolvency and

Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiation of Corporate Insolvency Resolution Process (CIRP) against Alfavision Overseas (India) Limited (Respondent) for the default amount of Rs. 6,50,69,301/- (principal amount Rs.1,50,00,000/- + interest amount of Rs. 5,00,69,301/-). The date of default is 09.10.2015.

2. The averments made by the financial creditor/applicant in its application and as argued by the learned counsel are summarised as under:

i. The applicant is an unlisted private company incorporated under the provisions of the Companies Act, 1956. The respondent is engaged into the business of trading commodities. In the year 2013, the respondent approached the applicant for an unsecured loan amounting to Rs.1,50,00,000/-. The unsecured loan amounting to Rs.1,50,00,000/- was given by the applicant to the respondent in five instalments of Rs.30,00,000/- each on 10.10.2013 for a period of two years at 24% per annum interest and the same was duly received by the respondent. However, since the applicant and respondent were known to each other no agreement was executed at the time of grant of loan.

ii. On the expiry of the period of two years, the applicant requested the respondent several times to repay the borrowed amount, however, the applicant was informed that the expected outcome of the pending litigation qua the assets on which the company claims to have rights has not been fruitful and in spite of best efforts it is unable to develop land and realize money. Therefore, the respondent instead of repaying the loan amount proposed a piece of land to the applicant and the same was denied by the applicant.

iii. The respondent has admitted the acceptance of the said loan amount since the same was paid through banking channels. Moreover the applicant has issued a notice dated 12.08.2016 requesting the respondent to repay the outstanding amount and that the respondent has not denied the receipt of the said amount. Therefore the entire amount is an admitted debt.

iv. The applicant filed a winding up petition on 22.09.2016 before the Hon'ble High Court of Madhya Pradesh, Bench at Indore in Company Petition No.41 of 2016, wherein vide order dated 18.07.2019 Hon'ble High Court transferred the winding up petition to this Adjudicating Authority and directed the applicant to convert the winding up proceedings into IBC proceedings under Insolvency & Bankruptcy Code, 2016.

v. Pursuant to the said order dated 18.07.2019 of the Hon'ble High Court the applicant filed the present application on 28.09.2020 before this Adjudicating Authority.

vi. The name of the Interim Resolution Professional (IRP) is proposed by the financial creditor Ms. Teena Saraswat Pandey (registration No. IBBI/IPA – 001/IP-P00652/2017-2018/11126) and the written consent of the same is also placed on record.

3. The objections raised by the corporate debtor/respondent in its reply dated 12.01.2023 and as argued by the learned counsel for the respondent are summarised as under:

i. The respondent is a listed public company incorporated under the provisions of the Companies Act, 1956. In the year 2013 the director of the applicant and the respondent i.e. Mr.Vinod Kumar Gupta & Mr. Vishnu Goyal respectively entered into an

oral agreement for the future sale of land admeasuring 24.5 acres. The said land is at village Saras (M.P.) and belongs to the respondent. Further, it was also agreed that the sale consideration was to be paid by Mr.Vinod Kumar Gupta director of the applicant in two instalments.

ii. The applicant paid Rs.1,50,00,000/- as an advance on 10.10.2013 through 5 cheques of Rs.30,00,000/- each to the respondent and on the same day at the request of Mr.Vinod Kumar Gupta the aforementioned amount was transferred by the respondent to Earawat Steels Private Limited. Mr.Vinod Kumar Gupta was the common director in the applicant company and Earawat Steels Private Limited.

iii. Further, the balance (second/final instalment) of total sale consideration amounting to Rs.9,80,00,000/- was agreed to be paid by Mr.Vinod Gupta within next two years failing which the respondent can forfeit the advance payment of the agreed sale price.

iv. On 09.10.2015 the default occurred, Mr.Vinod Gupta breached the oral agreement to pay the respondent the final instalment for the sale of land at Saras (M.P.) and therefore, the respondent forfeited Rs.1,50,00,000/- (advance payment) as per the oral agreement.

v. The applicant has made false averment about an unsecured loan and as per the said averment the loan was to be repaid by the respondent within two years and that too at the rate of 24% compounded annually. The applicant issued legal notice dated 19.08.2016 seeking repayment of the alleged loan and subsequently filed a winding up petition on 22.09.2016 before the

Hon'ble High Court of Madhya Pradesh, Bench at Indore, wherein the respondent filed its reply on 28.06.2017.

vi. On 1.10.2016 Mr.Vinod Gupta director of the applicant company resigned as a director. The applicant on 14.10.2016 filed Civil Suit (No.5-B/2016) before the Ld. XV Addl. District Judge, Indore for recovery of the forfeited amount along with interest.

vii. The winding up petition filed before Hon'ble High Court of Madhya Pradesh, Bench at Indore was transferred to this Adjudicating Authority by the Hon'ble High Court vide its order dated 18.07.2019. Subsequently, the applicant suddenly withdrew the civil suit on 06.10.2020 and stated that the applicant does not want to proceed with the suit for recovery of the forfeited amount. Moreover, no leave was sought by the applicant for approaching another forum for re-litigating the same cause of action. The applicant has concealed the fact that the application for the same amount was filed before the Civil Court and further the applicant withdrew the suit without seeking liberty to pursue a fresh claim in a different forum for the same cause of action.

viii. The transferred amount was a forfeitable advance and not a loan. Moreover, the applicant has produced only one document to prove the financial debt i.e. the balance sheet of the respondent. However, the said balance sheet also does not prove the existence of financial debt; since the entries made in the balance sheet of the applicant and the respondent regarding the transferred amount of Rs.1,50,00,000/- is entirely different. As per the balance sheet of the applicant for the year 2013-14 the said amount has been recorded under the head Assets: Long term

loans & advances as loan to Alfavision Overseas, whereas the respondent has for the same financial year recorded the same amount as Advance for sale of Saras land and for the financial year 2016-17 recorded the same as Vinod Gupta (Advance for sale of Saras land).

There is conflict between the accounting treatment of the disputed amount and therefore the balance sheet cannot be used to support the false claim of the applicant. Further, once the applicant has withdrawn a civil suit without any liberty to re-open should not be permitted to re-open and re-litigate the matter for the same cause of action.

4. The applicant has filed its rejoinder on 26.02.2021. The submissions are summarised as under:

i. The contention of the respondent that the loan was given by Shri Vinod Kumar Gupta as advance for purchase of land is incorrect and misleading. Further, the contention of the respondent that the amount received from the applicant was transferred to Earawat Steels Private Limited at the request of the director of the applicant company is incorrect, the fact is such that Mahaganpati Investment Private Limited and Earawat Steels Private Limited being group companies of the applicant has paid Rs.1,50,00,000/- to the applicant in five tranches of Rs.30,00,000/- each to the applicant and the same amount was then transferred by the applicant to the respondent.

ii. Moreover, on one hand the respondent states that the amount received from the applicant was transferred to Earawat Steels Private Limited and on the other hand the respondent

claims that the amount received has been forfeited for non-completion of the transaction.

iii. Further the land which is the subject matter of the transaction is neither in the name of the respondent nor in the name of the director of the respondent but is in the name of M/s Alfavision Fibres Private Limited which is a separate legal entity. Therefore, the respondent could not have accepted the amount for the land owned by another company.

iv. The respondent has in its audited balance sheet as on 31.03.2014 recorded the said loan amount under the head 'Long Term Borrowings- Term Loans from others', however, the respondent has in notes to accounts added a table (format of which is completely different from the schedules attached to the said balance sheet) detailing the long term borrowings wherein the respondent has incorrectly mentioned the said amount as Advance for Sale of Saras Land.

v. The respondent has manipulated the balance sheets for the subsequent years and has recorded the advance amount as Vinod Gupta (Advance for sale of Saras land). Further, if at all the contention of the respondent that they have returned the advance amount in the group company of the applicant is considered then as to for what reason the respondent records the said advance amount in their balance sheet.

vi. The petition for winding up of the respondent was filed before the Hon'ble High Court of Madhya Pradesh, Bench at Indore and also filed a civil suit for recovery of the amount against the respondent. However, the civil suit for recovery was withdrawn as the applicant did not want to pursue that suit.

vii. Further, the winding up petition was transferred by the Hon'ble High Court of Madhya Pradesh, Bench at Indore to this Adjudicating Authority, therefore, there was no requirement of seeking any kind of liberty to file an application for the same amount.

5. The respondent has through its surrejoinder dated 17.06.2021 submitted the following:

(i) The transaction with Earawat Steels Private Limited was independent to this matter and has nothing to do with the present matter;

(ii) The correct sale deed has been filed subsequently;

(iii) That the respondent has never stated that the money was returned to Mr.Vinod Gupta through Earawat Steels Private Limited;

(iv) The applicant has in its rejoinder submitted that the applicant has withdrawn the civil suit due to unwillingness to pursue the suit.

6. We have heard the learned counsel for the applicant as well as for the respondent and perused the material available on record. It is an undisputed fact that the applicant had transferred Rs.1,50,00,000/- to the respondent in five equal tranches of Rs.30,00,000/- each on 10.10.2023. However, no agreement for the same was executed between the applicant and the respondent.

7. It is noted that the applicant contends that the said amount was transferred to the respondent as a loan for two years at the interest of 24% p.a. whereas the respondent contends that the said amount was received as an advance for sale of a land. It is further noted that after

two years from the date of transfer of the amount the applicant has issued notice on 12.08.2016 requesting the respondent to repay the said amount transferred as loan. Subsequently, on failure to repay the loan by the respondent, the applicant filed a winding-up petition on 22.09.2016 before the Hon'ble High Court of Madhya Pradesh, Bench at Indore in Company Petition No.41 of 2016.

Moreover, the applicant has also filed a Civil Suit (No.5-B/2016) before the Ld. XV Addl. District Judge, Indore on 14.10.2016 for recovery of the amount along with interest.

8. It is noted that the winding up petition was transferred by the Hon'ble High Court vide its order dated 18.07.2019 to this Adjudicating Authority. Subsequently, the applicant withdrew the civil suit on 06.10.2020.

9. Considering the above we find that no agreement was executed between the applicant and the respondent. Further, no document has been placed on record to show the default recorded with the Information Utility for the loan given to the respondent as contended by the applicant. Moreover, there is no amount paid by the respondent even as interest and therefore, in the absence of the documents and record and in the event of difference in recording the nature of transaction in the financial statements of both the applicant and the respondent, it is difficult to ascertain whether the amount was disbursed by the applicant against the consideration for time value of money to be considered as financial debt as per section 5(8) of the Code.

10. Another issue is whether the application is barred by limitation. The applicant gave loan on 10.10.2013 for two years to the respondent and filed a winding up petition before Hon'ble High Court of Madhya Pradesh, Bench at Indore on 26.09.2016. Subsequently, in the said

matter the applicant filed an application (IA No. 5129/19) before the Hon'ble High Court seeking direction to transfer the said winding up petition to NCLT for initiation of CIRP. The said petition was then transferred vide order dated 18.07.2019 to the Adjudicating Authority. The relevant part of the said order is reproduced hereunder:

..... *The Hon'ble Supreme Court in the matter of **Forech India Ltd. Vs. Edelweiss Assets Reconstruction Co. Ltd. in Civil Appeal No.818/2018**, wherein by the judgment dated 22.1.2019 it has been held that:-*

"17. The resultant position in law is that, as a first step, when the Code was enacted, only winding up petitions, where no notice under Rule 26 of the Companies (Court) Rules was served, were to be transferred to the NCLT and treated as petitions under the Code. However, on a working of the Code, the Government realized that parallel proceedings in the High Courts as well as before the adjudicating authority in the Code would stultify the objective sought to be achieved by the Code, which is to resuscitate the corporate debtors who are in the red. In accordance with this objective, the Rules kept being amended, until finally Section 434 was itself substituted in 2018, in which a proviso was added by which even in winding up petitions where notice has been served and which are pending in the High Courts, any person could apply for transfer of such petitions to the NCLT under the Code, which would then have to be transferred by the High Court to the adjudicating authority and treated as an insolvency petition under the Code. This statutory scheme has been referred to, albeit in the context of Section 20 of the SICA, in our judgment which is contained in Jalpur Metals & Electricals Employees Organization Through General Secretary Mr. Tej Ram Meena Vs, Jaipur Metals & Electricals Ltd. Through its Managing Director & Ors., being a judgment by a Division Bench of this Court dated 12.12.2018."

Having regard to the aforesaid, after the amendment a party has right to apply for transfer of winding up petition to the NCLT even after service of notice of the petition to the other side and on making of such an application, the High Court has power to transfer it. Counsel for the respondent has raised the issue of forum non convenience placing reliance upon the judgments of the Supreme Court in the matter of Krishna Veni Nagam (supra) and in the matter

of Mayar (H.K.) Ltd. (supra), but in the present case no such issue arises as the petitioner is at Mumbai and the respondent is at Indore and the Bench of the tribunal presently having jurisdiction is at Ahmedabad which is not far off. Even otherwise, the Bench has already been notified at Indore. That apart, in terms of the dictum of the Supreme Court, this petition is required to be transferred to NCLT.

Hence, I am of the opinion that IA No.5129/19 deserves to be and is accordingly allowed and the present petition is transferred to NCLT, Ahmedabad which currently having the jurisdiction.

11. Pursuant to the said order of the Hon'ble High Court the applicant filed the said petition under section 433(e) of the Companies Act, 1956, before this Tribunal wherein it was numbered as TP No.4 of 2020. The Adjudicating Authority vide its order dated 30.07.2020 directed the applicant to convert the transfer petition under Insolvency & Bankruptcy Code, 2016 and therefore, the applicant filed the present application i.e. CP(IB) 77 of 2020 on 28.09.2020. For ready reference the order dated 30.07.2020 of this Adjudicating Authority is reproduced hereunder:

..... This winding up petition appears to be transferred from Hon'ble High Court of Madhya Pradesh to this Bench. This TP has been filed u/s 433(e) of Companies Act, 1956.

We make it clear that this application has to be converted into IBC proceedings. Hence, we direct the petitioner to get converted this application under IBC, 2016 within 4 weeks. Matter stands adjourned to 18.09.2020.

12. Moreover, the counsel for the applicant represented that present application is filed in continuation of TP No. 4 of 2020, hence the pending period of Company Petition No. 41 of 2016 before the High Court i.e. from 22.09.2016 to 18.07.2019 to be excluded under Section 14 of Limitation Act, 1963. Thus, considering the order of the Hon'ble High Court in Company Petition No. 41 of 2016 and order of this Adjudicating Authority in TP No. 4 of 2020 it appears that the present

application is filed in continuation of the above and therefore, the present application is within the limitation period.

13. It is also noted that the applicant filed a civil suit No.5-B/2016 for recovery of the loan amount of Rs. 1,50,00,000/- with interest, before the Additional District Judge, Indore. After framing the issues, the applicant withdrew the suit and the suit was dismissed as withdrawn on 06.10.2020. The question now arises is after the dismissal of Civil suit whether the applicant has the right to continue/maintain this application under the Code.

14. The application under section 7 or 9 of the Code can be entertained when there is enforceable debt and default. The cause of action to file the suit culminated into a decree of dismissal. The original cause of action to file the civil suit and to file this section 7 of the Code application merged with the decree of the Civil suit. Once the cause of action culminated into a decree either in positive or negative, the applicant cannot fall back upon the original cause of action to file any proceeding or continue with any pending civil proceedings.

15. The petitioner withdrew the suit without any liberty from the court. Order XXXIII Rule (4)(b) of CPC 1908, precluded the petitioner from instituting any fresh suit in respect of the said subject matter.

16. The order of dismissal of suit as withdrawn passed in Civil Suit is valid and existing. If this Adjudicating Authority proceeds with this application there is a possibility of passing inconsistent order on the same facts. Further, the Supreme Court of India in **Odisha Vs. Lakshmi Narayan Das 2023 SCC Online SC 825** held that after the dismissal of the civil suit as withdrawn a writ petition on the same subject is not maintainable. Here also the applicant had already filed the civil suit for recovery of money on the basis of same cause of action and

subsequently withdrawn the suit. Hence, the debt is not subsisting and therefore, the applicant is not entitled to continue with this application.

17. The parties in this application and civil suit are the same. The order passed in the Civil Suit is final. The order passed by the competent Civil Court and when it is in force it cannot be ignored. When the applicant abandoned his claim before the Competent Civil Court, he lost his right to proceed with this application filed on the same cause of action, since as on today, there is no enforceable debt.

18. In the circumstances, we are of the considered view that in the absence of sufficient documents and record the debt cannot be considered as financial debt as defined under section 5(8) of the Code and even otherwise after the dismissal of the Civil Suit as withdrawn, the applicant is not entitled to maintain/continue with this application.

19. Accordingly, CP(IB) 77 of 2020 is rejected and disposed of.

-sd-

Kaushalendra Kumar Singh
Member (Technical)

-sd-

P. Mohan Raj
Member (Judicial)

Swati Khandelwal