

IN THE NATIONAL COMPANY LAW TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

CP (IB) – 97 (PB)/2023

Order 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 Kaliber Associates Private Limited

... Financial Creditor

Versus

M/s Allied Software Development Private Limited

Registered Office:

House No. 24, Harijan Basti, Gadaipur

South Delhi- 110030

CIN No.: U45201DL2005PTC135791

... Corporate Debtor

Order Pronounced On: 07.02.2024

CORAM:

**CHIEF JUSTICE (RETD.) RAMALINGAM SUDHAKAR
HON'BLE PRESIDENT**

**SHRI AVINASH K. SRIVASTAVA
HON'BLE MEMBER (TECHNICAL)**

APPEARANCES:

For the Financial Creditor : Mr. Anirban Bhattacharya, Mr. Rajeev
Chowdhary, Advocates

For the Corporate Debtor :

ORDER

1. The present application is filed by M/s Kaliber Associates Private Limited, through its Liquidator, Mr. Mohan Lal Jain on 08.02.2023 under Section 7 of the Insolvency and Bankruptcy Code, 2016 (**the Code**), r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating the Corporate Insolvency Resolution Process (**CIRP**), declaring moratorium and for appointment of Interim Resolution Professional (**IRP**), against the Corporate Debtor (**CD**) viz. M/s Allied Software Development Private Limited.
2. The total amount claimed to be in default as per Part-IV of the application is **INR 3,00,00,000/-** (Rupees Three Crores only).
3. The CD was incorporated on 04.05.2005, having CIN: U45201DL2005PTC135791, under the Companies Act, 1956. The registered address of the Corporate Debtor is at House No. 24, Harijan Basti, Gadaipur, Delhi, South Delhi 110030. Therefore, this Bench has jurisdiction to deal with this application. A copy of the master data of the Corporate Debtor is attached as Annexure-4 at Page 43 of the Application.
4. That on 17.02.2023, notice was issued to the Respondent returnable by 01.03.2023. The Applicant filed their Affidavit of service on 28.02.2023 and 18.03.2023. Since, service could not be effected due to non-traceability of address of the Respondent, the Applicant sought liberty to resort to “substituted mode of service”, and the same was allowed vide order dated 22.08.2023. Accordingly, the Applicant carried out paper publication on 22.09.2023 and filed Affidavit of Service to this effect on 27.09.2023.
5. Despite giving many opportunities to the Respondent to appear, none appeared on behalf of the Respondent in any of the

hearings. Thus, we were constrained to set the Respondents *Ex-Parte*, vide order dated 04.10.2023.

6. Vide order dated 04.10.2023, a query was raised as to non-availability of any loan agreement in the case, to which Ld. Counsel for the Applicant made submissions during course of hearing on 17.10.2023 and relied upon *Vipul Himmatlal Shah and Another v. Teco Industries*, 2022 SCC OnLine NCLAT 209 and NeSL certificate to effect that it is not necessary to produce the financial contents of the loan agreement to prove the default and the same can be proven with reference to the NeSL Certificate, Bank Statement, Financial Statement, ledger etc. After hearing detailed submissions made by the Ld. Counsel, orders were reserved on 28.11.2023.

7. Facts of the Case and Submissions made by Ld. Counsel for the Applicant

- i. The Applicant on 10.11.2010 had disbursed an amount of Rs. 3,00,00,000/- (Rupees Three Crores Only) to M/s Allied Software Development Pvt. Ltd.
- ii. Vide Order dated 18.01.2019 passed in C.P. (IB) 228/ 2018, the Hon'ble NCLT New Delhi, Bench II admitted the Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter "IBC") filed by Relan Buildwell Pvt. Ltd. against Kaliber Associates Private Ltd., The Applicant was further admitted to Liquidation vide order dated 02.01.2020. The Application in the present case has been filed through Liquidator, Mr. Mohan Lal Jain. The Adjudicating Authority vide order dated 01.12.2020 has granted a liberty to Liquidator of the Applicant in an I.A. No. 4559/ 2020 under Section 33(5) read with Section 35(1)(k) of the code in C.P. (IB) 228/ 2018

for institution of suit or other legal proceedings including filing of present application under Section 7 of IBC.

- iii. The RP, Ms. Ritu Rastogi of the Applicant vide letter dated 10.05.2019, intimated Directors of the CD that as per the Audited Financial Statement of the Applicant as on 31.03.2018, a sum of Rs. 3,00,00,000/- (Rupees Three Crores Only) was due and payable by CD to the Applicant and called upon them to pay the same.
- iv. Vide another letter dated 18.07.2019, newly appointed RP, Mr. Mohan Lal Jain of the Applicant, intimated Directors of the CD that as per the Audited Financial Statement of the Applicant as on 31.03.2018, a sum of Rs. 3,00,00,000/- (Rupees Three Crores Only) was due and payable by CD to the Applicant and called upon them to pay the said amount together with the interest.
- v. The Applicant has submitted that the CD's Balance Sheet as on 31.03.2015, 31.03.2021 and 31.03.2022 reflected a sum of Rs. 3,00,00,000/- (Rupees Three Crores Only) under "Long-Term Borrowings" which is due and payable by Respondent/CD to the Applicant.
- vi. In the financial Statements of the Applicant containing the Balance Sheet, Statement of Profit and Loss and Cash Flow Statement for the FY 2017-18, an amount of Rs. 3,00,00,000/- is reflected to have been paid by the Applicant as "Short Term Loans and Advances" to Respondent.
- vii. Further Applicant's Balance Sheet being a part of Provisional Financial Statement as on 18.01.2019 (the CIRP commencement date of the Applicant) reflects an amount of Rs. 3,00,00,000/- against the name of M/s Allied Software Development Pvt. Ltd. under "Loans and Advances to Others".

- viii. The Liquidator of Applicant issued a legal notice dated 20.07.2020 to the Directors of Respondent/CD calling upon them to pay the outstanding balance of Rs. 3,00,00,000/- together with the interest.
- ix. National E- Governance Services Ltd. (NeSL), issued a Record of Default (RoD) to the Applicant whereby, it authenticated the 'default' filed by Applicant with respect to debt owed against CD. The status of Application is stated as 'Deemed to be Authenticated'.

8. The Financial Creditor has *inter alia* relied upon the following documents:

- i. Record of Default as registered with the National E-Governance Services Ltd, as Annexure-6;
- ii. Extracts of the Bank Statement of the Applicant from 01.04.2008 to 31.03.2011 as Annexure-7;
- iii. Independent Auditors Report of the Respondent/CD for the Financial Year ending 31.03.2015 as Annexure-8;
- iv. Financial Statements of the Applicant as on 31.03.2018, as Annexure-9;
- v. Provisional Financial Statement of the Applicant as on 18.01.2019, as Annexure-10;
- vi. Independent Auditor's Report of the Respondent/CD for the Financial Year ending 31.03.2021, as Annexure-11;
- vii. Independent Auditor's Report of the Respondent for the Financial Year ending 31.03.2022, as Annexure-12;
- viii. Letter dated 31.01.2019 issued by IRP of the Applicant to Directors of the Respondent, as Annexure-13;
- ix. Letter dated 10.05.2019, issued by RP of the Applicant to Directors of the Respondent as Annexure-14;
- x. Letter dated 18.07.2019, issued by RP of the Applicant to Directors of the Respondent as Annexure-15;

- xi. Legal Notice dated 20.07.2020, as Annexure-16;
- xii. Demand Notice dated 14.12.2022, email dated 14.12.2022, speed post receipt and tracking, as Annexure 17;
- xiii. Decision of the Hon'ble NCLAT in *Vipul Himatlal Shah vs. Teco Industries*, decided on 18. 05. 2022, as Annexure-19;

9. Analysis and Findings

- i. We have heard the Ld. Counsel for the Applicant and perused the documents submitted.
- ii. The only issue which needs to be determined is whether the Applicant has been able to prove the existence of "Financial Debt".
- iii. We have noted that there is no formal agreement in place between the Applicant and the CD with respect to financial debt as claimed by the Applicant. However, we are satisfied on perusal of order passed by the Hon'ble NCLAT in the case of *M/s Agarwal Polysacks Ltd. v. M/s K.K. Agro Foods and Storage Ltd.*, Company Appeal (AT) (Insolvency) No. 1126 of 2022 that existence of formal financial contract is not essential to maintainability of Application under section 7 of the Code and the financial debt in question may also be validly inferred from other documents such as balance sheet, auditor's report, NeSL certificate etc. The relevant portion of order reads as:

11. We need to test the submission of learned counsel for the Respondent that the written financial contract is necessary for proving debt. A financial contract supported by financial statements as evidence of the debt is one of the documents contemplated in Regulation 8(2) but that is not exclusive requirement for proving existence of debt. Financial contract thus can very well be furnished to prove the financial debt but a plain reading of Regulation 8(2) indicate that it is not mandatory that existence of financial debt has to be proved by a financial contract. For example: records available with an information utility can very

well be used as proof for existence of financial debt. Further, financial statements showing that the debt has not been paid is also one of the clauses in Regulation 8(2) by which existence of debt can be proved.

21. When we look into the statutory scheme as reflected in the Application to Adjudicating Authority Rules, 2016 and CIRP Regulations, 2016, it is clear that financial debt can be proved from other relevant documents and it is not mandatory that written financial contract can be only basis for proving the financial debt. We, thus, answer Issue No.1 holding that it is not necessary that written financial contract be the only material to prove the financial debt.

- iv. The Applicant has duly placed report dated 26.02.2021 issued by National E-Governance Services Limited (NeSL) which states the amount of debt to be INR 3,00,00,000/- and the date of default to be 18.01.2019.
- v. Further, Independent Auditor's Report of the Respondent for the FY ending on 31.03.2021, duly mentions "Long Term Borrowing" from Kaliber Associates Pvt. Ltd. to be INR 3,00,00,000/-. The said debt remains pending to Kaliber Associates Pvt. Ltd. as evident from Auditors Report for the FY ending on 31.03.2022.
- vi. We find it relevant to mention relevant extracts of the observation made by the Hon'ble NCLAT in the case of *Vipul Himatlal Shah Vs. Teco Industries, Company Appeal (AT) (Insolvency) No. 470 of 2022*, which are as follows:

16. In the light of the detailed discussion as above, it is clear that in case the record of Information Utility shows that there is a debt which is in default, the Adjudicating Authority or the Appellate Authority are not required to further examine the record maintained by the Information Utility, moreso when the record of the Information Utility is deemed authenticated and no dispute or refutation of said record has been done by the corporate debtor earlier...

- vii. On a careful perusal of the decision of the Hon'ble NCLAT, we are convinced that when we have been provided with the report of Information Utility viz. report dated 26.02.2021 issued by NeSL, which duly states the date of default and proves the existence of debt and default, we being bound by the aforesaid decision of the Hon'ble NCLAT, need not further examine the matter. Further, the RoD by NeSL records the date of default as 18.01.2019. This along with Auditor's Report of the Respondent for FY ending on 31.03.2021 and 31.03.2022, leaves us in no doubt that the present Application filed under section 7 of the Code, is well within limitation.
- viii. We have given ample opportunity to the Respondent/CD to appear, despite the same, the Respondent/CD has not made appearance to defend. Further, we observe that Respondent had sufficient opportunity to raise dispute before NeSL against the information of default which has not been done and as such the same is accurate.
- ix. Therefore, in view of record of default maintained by NeSL; Auditor's Report of the Respondent for FY ending 31.03.2021 and 31.03.2022 and observations made by the Hon'ble NCLAT in the case of *Vipul Himatlal Shah Vs. Teco Industries, Company Appeal (AT) (Insolvency) No. 470 of 2022*, we find the present Application filed under Section 7 of IBC, 2016 to be maintainable and within the period of limitation. The existing financial debt is of more than rupees one crore and its default is also proved. Accordingly, we are inclined to admit the Application filed under section 7(2) of the Code for initiation of CIRP against the Respondent/CD.

O R D E R

In light of the above facts and circumstances, it is, **hereby ordered** as follows: -

- i. The Application bearing **C.P. (IB) -97/(PB)/2023** filed by Kaliber Associates Private Limited through its Liquidator, the Applicant/(FC), under section 7 of the Code read with rule 4(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against **ALLIED SOFTWARE DEVELOPMENT PRIVATE LIMITED**, the Respondent/Corporate Debtor, is hereby **admitted**.
- ii. As a consequence of the Application C.P. (IB) 97(PB)/2023 being admitted in terms of Section 7 of the Code, moratorium as envisaged under the provisions of Section 14(1) of the Code, shall follow in relation to the Respondent/(CD) as per clauses (a) to (d) of Section 14(1) of the Code. However, during the pendency of the moratorium period, terms of Section 14(2) to 14(3) of the Code shall come into force.
- iii. The Applicant/(FC) has proposed the name of **Mr. Gagan Gulati** as the IRP. His email id is ipgagangulati@gmail.com. His registration number is **IBBI/IPA-002/IP/N-00893/2019-2020/12832**. He has filed his written communication, **(Page 44 of the Application)** as per the requirement of Rule 9(l) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. There is a declaration made by him that there are no disciplinary proceedings pending against him with the Board or ICSI Insolvency Professional Agency. In addition,

further necessary disclosures have been made by Mr. Gagan Gulati as per the requirement of the IBBI Regulations. Accordingly, he satisfies the requirement of the Section 7(3)(b) of the code. Hence, we appoint **Mr. Gagan Gulati** as the IRP of the Respondent/Corporate Debtor.

- iv. In pursuance of Section 13 (2) of the Code, we direct the IRP or the RP, as the case may be to make a public announcement immediately with regard to the admission of this application under Section 7 of the Code. The expression 'immediately' means within three days as clarified by Explanation to Regulation 6 (1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- v. During the CIRP period, the management of the Respondent/CD shall vest in the IRP or the RP, as the case may be, in terms of Section 17 of the IBC. The officers and managers of the Respondent/CD shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this Order, in default of which coercive steps will follow. There shall be no future opportunities in this regard.
- vi. The IRP is expected to take full charge of the Respondent/CD's assets, and documents without any delay whatsoever. He is also free to take police assistance in this regard, and this Court hereby directs the Police Authorities to render all assistance as may be required by the IRP in this regard.

- vii. The IRP or the RP, as the case may be shall submit to this Adjudicating Authority periodical report with regard to the progress of the CIRP in respect of the Respondent/Corporate Debtor.
- viii. The Applicant/FC shall deposit a sum of **Rs.5,00,000/- (Rupees five Lakhs only)** with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to the approval of the Committee of Creditors (CoC).
- ix. In terms of Section 7(7) of the Code, the Registry is hereby directed to communicate a copy of the order to the Applicant/FC, the Respondent/CD, the IRP and the Registrar of Companies, NCR, New Delhi, by Speed Post and by email, at the earliest but not later than seven days from today. The Registrar of Companies shall update his website by updating the status of the Respondent/CD and specific mention regarding admission of this petition must be notified.
- x. The Registry is further directed to send a copy of this order to the Insolvency and Bankruptcy Board of India for their record.
- xi. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Sd/-
RAMALINGAM SUDHAKAR
(PRESIDENT)

Sd/-
AVINASH K. SRIVASTAVA
MEMBER (TECHNICAL)