IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH (Court– I)
KOLKATA

C.P. (IB) 73/KB/2023

*A petition 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:

1. **Shri Arihant Merchants Private Limited [**CIN: U52335WB1992PTC056826];
2. **Woodland Retails Private Limited [**CIN: U74999WB2011PTC169286**];**
3. **Arrowspace Advisors Private Limited [**CIN: U74999WB2012PTC174679**]**

………. Financial Creditors/ Petitioners

-versus-

NKR reality Private Limited

………….. Corporate Debtor/ Respondent

Date of Pronouncement of the order: 12th March 2024

Coram:

Mr. Rohit Kapoor, Member (Judicial)

Mr. Balraj Joshi, Member (Technical)

Appearances (via video conferencing/physical):

For the Financial Creditor:

Mr. Rishav Banerjee, Adv.

Mr. Supriyo Gole, Adv.

Ms. Madhuja Barman, Adv.

Ms. Prerna Shaha, Adv.

ORDER

Rohit Kapoor, Member (Judicial):

1. This Court convened through hybrid mode.

2. This is a Company Petition under section 7 of the Insolvency and Bankruptcy Code, 2016 (herein after referred as "the Code" or "IBC") by **Shri Arihant Merchants Private Limited & Ors**, hereinafter referred to as "*Financial Creditors*" seeking to initiate Corporate Insolvency Resolution Process ("CIRP") against **NKR Realty Private Limited**, hereinafter referred to as "Co*rporate Debtor*".
3. The Corporate Debtor is a private limited company incorporated on 01.09.2015. The authorized share-capital of the company ₹10,00,000/- and the paid-up share capital of the company is ₹1,00,000/-.
4. The total amount claimed to be in due to the Financial Creditor, is Rs. . 1,21,23,815/-. The date of default is mentioned as 10.12.2022.
5. The Financial Creditor has relied on the various documents in support of its claims, including:
    a) Balance Sheets of the Corporate Debtor, annexed as Exhibit **F**;
    b) Three Loan Recall notices dated 30.11.2022, annexed as Exhibit **I**;
    c) Copy of Confirmation of Accounts, annexed as Annexure **K**;
    d) Copy of TDS Certificate, annexed as Annexure **L**;
    e) Copy of Bank Statements of the Financial Creditor, annexed as Annexure **N**.

6. *Submissions on behalf of the Financial Creditor*:

6.1 The Financial Creditors entered into verbal agreements with the Corporate Debtorbased on the long-standing business relationship between them, whereby the Financial Creditor advanced three loans to the Corporate Debtor. The loans were repayable on demand and the Corporate Debtor was well aware that the demand loan had to be repaid along with interest component calculated at agreed rate of interest for financial year starting from 2018-19 till November 2022.

6.2 The Corporate Debtor kept making the payment only of the interest component, however, the Financial Creditors realised the Corporate Debtor would not be in a position to repay the principal amount and hence, all the

Financial Creditors revoked the demand loan and recalled the financial assistance provided to the Corporate Debtor.

6.3 Recall notices[1] dated 30.11.2022 were sent by the Financial Creditors to the Corporate Debtor but the Corporate Debtor did not pay any heed to the said recall notice. The Corporate Debtor did not make payment to the Financial Creditors.

6.4 The Corporate Debtor has given confirmation of accounts[2] to the Financial Creditors, thereby acknowledging its liability towards the Financial Creditors. Further, the Corporate Debtor has also deducted TDS[3] on the amounts advanced by the Financial Creditors.

6.5 A total amount of Rs. 1,21,23,815/-is due and payable at the present time.The date of default is 10.12.2022. The details of the sum advanced by the three creditors are provided hereinafter:

Financial Creditor	**Amount of loan given[4]**	**Amount Due including interest[5]**
Shri Arihant Merchants Private Limited	Rs.39,50,000/-	Rs.39,74,152/-
Woodland Retails Private Limited	Rs. 40,00,000/-	Rs.40,11,508/-
Arrowspace Advisors Private Limited	Rs. 2,12,50,000/-	Rs.41,38,155/-
Total		Rs. 1,21,23,815/-

7 ***Analysis and Findings*:**

7.1 Heard the Ld. Counsel on behalf of the Financial Creditor and perused the records.

7.2 It is noted that on 20.04.2023, this Adjudicating Authority directed the Registry to issue notice to the respondent by speed-post as well as e-mail. However, despite

[1]Annexure I
[2]Annexure K
[3]TDS Certificates annexed as Annexure L
[4] Statements reflecting disbursements, annexed as Annexure G
[5] Working sheet depicting the outstanding amounts, annexed as Annexure J

the service of notice, no one appeared on behalf of the Corporate Debtor in the subsequent hearings and as such, vide order dated 26.06.2023, the Corporate Debtor was set *ex-parte*.

7.3 Before coming to the merits of the case, we would like to refer to the decision of the Hon'ble Supreme Court in ***Innoventive Industries Ltd. v. ICICI Bank***[6] wherein the Apex Court has held as follows:

> *"28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the Explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor — it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in Part III, particulars of the financial debt in Part IV and documents, records and evidence of default in Part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. <u>It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that</u>*

[6] 2017 SCC SC 1025

a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be."

7.4 As such, in order to adjudicate upon a petition filed under section 7 of the Code, the Adjudicating Authority needs to primarily ascertain that a 'debt' and 'default' exist.

7.5 Upon perusal of the records in the instant matter, it is clear from the Bank statements of the Financial Creditors that various amounts on different occasions had been transferred to the account of the Corporate Debtor. Further, the petitioners have relied upon confirmation of accounts dated 01.04.2022 which also shows the sums payable by the Corporate Debtor as standing in the books of accounts of the Financial Creditor. The same also contains the stamp of the Corporate Debtor. The TDS Certificates annexed to the petition also show that the Corporate Debtor also deducted TDS on the amounts advanced by the Financial Creditor. As such, it is clear that certain sums had been disbursed by the Financial Creditors to the Corporate Debtor. The debt accordingly stands established.

7.6 With regard to existence of default, the Financial Creditors have claimed that the loans were advanced on the basis of verbal agreements and were payable on demand. As a proof of demand, the Financial Creditor have relied on the three recall notices dated 30.11.2022 sent by the Financial Creditors to the Corporate Debtor. The averments in the petition filed by the Financial Creditors are also supported by Affidavits affirmed by the petitioners. It is noted that the Corporate Debtor was set *ex-parte* and has not filed any representation in opposition to the petition filed by the Financial Creditors.

7.7 At this juncture, we would like to refer to Order VIII of the Code of Civil Procedure, 1908 ("CPC"). According to Rule 5(2) of Order VIII, where the defendant has not filed a pleading, it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability, but the Court may, in its discretion, require any such fact to be proved.

7.8 In regard to Order VIII Rules 5(2), we would also like to refer to the decision of Hon'ble Supreme Court in the matter of ***Balraj Taneja & Anr vs. Sunil Madan & Anr***[7] wherein the Apex Court has held has follows:

> *" Sub-rule (2) provides that if the defendant has not filed his written statement, it would be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint. The rule further proceeds to say that notwithstanding that the facts stated in the plaint are treated as admitted, the Court, though it can lawfully pass the judgment, may before passing the judgment require such fact to be proved. The rule is thus in consonance with the Proviso which also requires the fact, even though treated as admitted, to be proved. Thus, the Proviso and Sub- rule (2) read together indicate that where:*
>
> *(i) an allegation of fact made in the plaint is not denied specifically, or*
>
> *(ii) by necessary implication, or*
>
> *(iii) stated to be "not admitted" in the pleading of the defendant, or*
>
> *(iv) the defendant has not filed the written statement, such allegations of facts shall be treated as admitted. "*

[7] AIR 1999 SC 3381

7.9 Further, according to Rule 10 therein, where any party from whom a written statement is required under rule 1 or rule 9 therein fails to present the same within the time permitted or fixed by the Court, as the case may be, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment a decree shall be drawn up.

7.10 The Court can therefore pronounce judgment on the basis of available pleadings and upon failure of the defendant to file Written Statement as per two separate and distinct provisions. The failure may be either under Order 8 Rule 5(2) under which the Court may either pronounce judgment on the basis of the facts set out in the plaint or require the plaintiff to prove any such fact; or the failure may be under Order 8 Rule 10 of CPC under which the Court is required to pronounce judgment against the defendant or to pass such order in relation to the suit as it thinks fit.

7.11 While the provisions of CPC do not apply to the proceedings under the Code, the underlying principles are applicable to the IBC proceedings. Relying on the principle behind Rules 5(2) and 10 of Order VIII, we are of the considered opinion that since the Corporate Debtor has failed to file any representation in spite of being provided opportunity to do so, this Adjudicating Authority is well within its jurisdiction to proceed on the basis of the assertions made in the petition filed by the Financial Creditors.

7.12 Since in the instant case, no reply has been filed by the Corporate Debtor, the assertions of the application **remain unrebutted**. In absence of any such rebuttal, the plea regarding the loan being payable on demand and the subsequent issuance of recall notice notices[8] dated 30.11.2022 therefore are treated as admitted. Accordingly, the 'default' stands established.

7.13 As per section 7(1) of the Code, Financial Creditors can jointly file application against a Corporate Debtor. It is seen that the cumulative amount of debt due to the three Financial Creditors amounts to Rs. 1,21,23,815/-. The said amount being more than rs. 1 Crore, meets the requirement set under section 4 of the Code.

[8] Annexure I, pages 60-77

Further, since the loan recall notice was issued on 30.11.2022, the petition is within limitation period.

7.14 In light of the aforesaid facts, circumstances and case-laws cited above, we are satisfied that the Corporate Debtor has defaulted in payment of the debt due to the Financial Creditors and as such the instant petition needs to be admitted.

7.15 It is, accordingly, hereby ordered as follows:-

i. The application bearing **CP (IB) No. 217/KB/2021** filed by **Rajendra Kumar Agarwal**, the sole proprietor of **BM Engineering Company**(*Operational Creditor*), under section 9 of the Code read with rule 6 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against **Oscorp Industries Private Limited** (CIN:74900WB2013PTC192320), the Corporate Debtor, is ***admitted***.

ii. There shall be a moratorium under section 14 of the IBC.

iii. The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.

iv. Public announcement of the CIRP shall be made immediately as specified under section 13 of the Code read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

v. **Mr. Bimal Kanti Choudhury ,** having registration number IBBI/IPA-001/IP-P01028/2017-2018/11682, **email: bimalkantichoudhury@gmail.com,** as per the IBBI Panel S.no.22 for the WB region, **is** hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the Code subject to submission of a valid Authorisation of Assignment in terms of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016.

vi. The fee payable to IRP or the RP, as the case may be, shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the Code.

vii. During the CIRP period, the management of the Corporate Debtor 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 Corporate Debtor 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.

viii. The IRP/RP shall submit to this Adjudicating Authority periodical reports with regard to the progress of the CIRP in respect of the Corporate Debtor.

ix. The Financial Creditor shall initially deposit a sum of ₹_3,00,000/- (Rupees Three lakh only) with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC). Further, the Fees of the IRP will be subject to the approval of the COC in accordance with Notification No. IBBI/2022-23/GN/REG091 dated 13.09.2022, issued by the Insolvency and Bankruptcy Board of India, as published in the in the Official Gazette.

x. In terms of section 7(5)(a) of the Code, Court Officer of this Court is hereby directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the IRP by Speed Post, email and WhatsApp immediately, and in any case, not later than two days from the date of this Order.

xi. **Additionally**, the Financial Creditor shall serve a copy of this Order on the IRP and on the Registrar of Companies, West Bengal, Kolkata by all available means for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this order.

7.16 **CP (IB) No. 73/KB/2023** to come up on **04-04-2024**for filing the progress report.

7.17 A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Rohit Kapoor
Member (Judicial)

Signed on this, the 12th day of March, 2024