**IN THE NATIONAL COMPANY LAW TRIBUNAL**
**DIVISION BENCH, COURT NO. II**
**KOLKATA**

Company Petition CP (IB) No. 264/KB/2022

***An Application under Section 7 of the Insolvency and Bankruptcy Code, 2016, read with Rule 4 of the Insolvency and Bankruptcy (Application to the Adjudicating Authority) Rules, 2016.***

**IN THE MATTER OF:**

**Emami Realty Limited**
**[CIN: L45400WB2008PLC121426]** **… Financial Creditor/ Applicant.**

**Verses**

**Fort Projects Private Limited**
**[CIN: U40102WB1996PTC077205]** **… Corporate Debtor/ Respondent.**

**Date of Hearing: October 13, 2023.**
**Date of Pronouncement: November 09, 2023.**

**Coram:**
**SMT. BIDISHA BANERJEE, MEMBER (JUDICIAL)**
**SHRI. ARVIND DEVANATHAN, MEMBER (TECHNICAL)**

**Appearance:**
**For the Financial Creditor:**
1. **Mr. Ratnanko Banerjee, Senior Advocate**
2. **Ms. R. Kejaria, Advocate**
3. **Ms. Manju Bhuteria, Advocate**

**For Corporate Debtor:**
1. **Ms. Manju Agarwal, Advocate**
2. **Ms. Swapna Choubey, Advocate**

**ORDER**

**PER Bidisha Banerjee, Member (Judicial):**

**1.** This Court is congregated through hybrid mode.

**2.** This instant application is filed under Section 7 of the Insolvency and Bankruptcy Code, for brevity I&B Code, read with Rule 4 of the Insolvency and Bankruptcy (Application to the Adjudicating Authority) Rules, 2016, by **"Emami Realty Limited",** registered office at: Acropolis 13th Floor, 1858/1, Rajdanga Main Road, Kolkata – 700107, hereinafter referred to as **"Financial Creditor" ("Applicant"/ "FC")** against **"Fort Projects Private Limited",** registered office at 7/1A, Hazra Road, Kolkata – 700026, hereinafter referred to as "**Corporate Debtor"**

**("Respondent"/ "CD")** seeking direction to initiate Corporate Insolvency Resolution Process (for brevity "CIRP") in respect of the Corporate Debtor.

**3.** The Corporate Debtor was incorporated on February 12, 1996, having the Authorized Share Capital of Rs. 10,00,00,000/- only and the Paid-up Capital of Rs. 7,67,62,000/- only **(MCA Master Data of the Corporate Debtor is annexed at Page 24 as Annexure "D" to the Application).**

**4.** It is claimed that the **Total Amount of Debt default and due is of Rs. 91,74,27,304/-** in which **Principal amount is of Rs. 82,61,90,657/-** and the **Interest amount is of Rs. 9,12,36,647/-** at rate 15% Per Anum calculated from December 16, 2021 to August 31, 2022. **The Date of Default is claimed as on December 15, 2021.**

**5.** **Brief Facts of the case:**

**5.1.** **Fort Projects Private Limited (Corporate Debtor)** along with Gagan Dealcom Private Limited has approached Emami Realty Limited (Financial Creditor) to seek financial accommodation / Loan of Rs.70 Crore for the purpose of undertaking developmental work of various properties for its real estate business.

**5.2.** In this regard a **Loan Agreement** was made on 15/02/2016, **annexed at Page 31-68 to the Application as Annexure "H"**, between the Corporate Debtor and Gagan Dealcom Private Limited along with 70 other co-owners/corporate guarantors and the Financial Creditor, referred to as Lender in the Agreement mentioned above setting out terms and conditions for financial accommodation/loan by the Financial Creditor to the Corporate Debtor.

**5.3.** In terms of Clause 5(1) of the said Agreement under the heading **'Loan Amount'** the Financial Creditor had agreed to lend an aggregate sum of Rs.70 Crore, as per the agreement out of the Loan Amount, a sum of Rs.35 Crore shall be lent to Borrower No. 1 who is the Corporate Debtor and the remaining sum shall be lent to Borrower No. 2 Gagan Dealcom Private Limited.

**5.4.** As per the Loan Agreement interest is payable at the rate to be decided by Mr. R.S. Agarwal, Chairman of the Emami Group of Companies and decision taken by Mr. Agarwal shall be final and binding on the borrowers. This is as per clause 6 of the Loan Agreement. The Loan Agreement provides repayment within 9 months from the date of execution of the said Loan Agreement along with interest.

**5.5.** In terms of the said Loan Agreement dated 15/02/2016, the Financial Creditor lent and advanced from time to time an aggregate sum of Rs. 34.55 Crore to the Corporate Debtor. Bank Statement of Emami Realty Limited evidencing payment of Rs.34.55 Crore has been placed on record by the Financial Creditor. The financial creditor further claims that the Corporate Debtor failed and neglected to make the payment towards the said loan amount within 9 months as stated in the Loan Agreement. in spite of repeated follow up by the Financial Creditor with the Corporate Debtor thru emails / letters.

**5.6.** After several discussions between the parties to the agreement, Financial Creditor entered into another loan agreement dated 26/02/220 with the Corporate Debtor and other corporate guarantors for the purpose of continuing with the earlier loan amount disbursed by the Financial Creditor with interest @15% per annum to be paid on the outstanding amount and the entire amount shall be repaid within a period of 6 months. The principal amount in the agreement dated 26/12/2020 was determined at Rs.64.04 Crore after adding interest at the rate of 15% from 15/2/2016 to 26/2/2020 on the Initial loan amount of Rs.34.55 Cr disbursed in terms of earlier agreement dated 15/2/2016.

**5.7.** However, after the expiry of the period of 6 months, the Corporate Debtor sought time till 15/12/2021 to repay the previous loan. The Financial

Creditor agreed to such a request and extended the time to repay the loan till 15th December, 2021.

**5.8.** As per Clause G of the said Agreement dated 26/02/2020, the total due including interest payable from the original date of disbursement of the loan comes to Rs.64,04,90,697/-. This amount is due as on 19/02/2020. The total amount became payable on 15/12/202 due to the extension given based on CD's request. However, since this was not paid, the amount payable was calculated at Rs.82,61,90,657/- as on 15/12/2021. To recover this amount, the Financial Creditor sent letters as well as e-mails. No reply was forthcoming and hence the Financial Creditor has filed this application claiming Rs. 91,74,27,304/- as defaulted amount which now includes interest up to 31/08/2022. Since his demand has not been met, this application been filed under Section 7 of the IBC to initiate Corporate Insolvency Resolution Process **(CIRP)** of the Corporate Debtor.

**6. Submissions of the Ld. Counsel for the Applicant:**

**6.1.** Ld. Counsel for the applicant submits that the amount in default is Rs.82,61,90,657/- as on 15/12/2021, which is the date of default as per him. Ld. Counsel further contended that as per the Loan Agreement dated 15/02/2016 loan of Rs.34.55 Crore was lent and advanced to the Corporate Debtor with stipulation that the sum will be repaid within 9 months from date of agreement/disbursement with interest. Determination of rate of interest was left to Mr. Agarwal, the Chairman of the Financial Creditor as per clause 6 of the Loan Agreement. Finally, the rate of interest was determined at 15% per annum.

**6.2.** Ld. Counsel for the applicant further submits that since the Corporate Debtor did not make payment of loaned amount with interest within the stipulated time, after several discussions and correspondences between the parties, i.e., the Financial Creditor and the Corporate Debtor made another agreement dated 26/02/2020 wherein it was agreed that the amount of loan advanced in terms of the earlier agreement dated 15/2/2016 along with applicable interest up to 26/02/2020 would be treated as principal in the new agreement dated 26/2/2020 and the same shall be repaid within six months at the rate of interest of 15% per annum and thereafter time was given to the Corporate Debtor to repay the loan on or before 15/12/2021. Despite assurance, the Corporate Debtor failed to make the payment and consequently this application under section 7 of the IBC has been filed for initiating Corporate Insolvency Resolution Process (to be hereinafter referred to as CIRP) of the Corporate Debtor.

**6.3.** Ld. Counsel for the applicant submitted that the amount of financial debt is far in excess of threshold limit, the application has been filed within the time limit and the application is complete in all respects. Therefore, all the conditions for admitting the petition under section 7 of the IBC. has been met and consequently submitted that application may be allowed and CIRP shall be initiated against the Corporate Debtor.

**7.** The Ld. Counsel for the Financial Creditor has proposed the name of **Mr. Kannan Tiruvengadam**, **[Registration no.: IBBI/IPA-001/IP-P00253/2017-2018/10482, Address: Netaji Subhas Villa Flat No. 3C, 3rd Floor, 18 Karunamoyee Ghat Road Near Dharapara Tollygunge, Kolkata, West Bengal ,700082], Email ID: calkannan@gmail.com**, for the appointment of **Interim Resolution Professional (IRP).**

**8. Submissions of the Ld. Counsel for the Respondents, per contra:**

**8.1.** Ld. Counsel for the respondents has alleged that Emami Group decided to join hands with Kathotia Group (one of the companies in the group is Fort projects, who is the CD in the given case) in carrying out development of real estate projects jointly. Ld. Counsel claims that a Memorandum of

Understanding was made between Emami Group and Kathotia Group (Fort Projects Private Limited) for carrying out projects on development of real estate at Rajarhat. He also relied on e-mail dated 14/09/2015 written by Mr. R. L. Gaggar to M/s. Emami Realty Limited in connection with development of real estate project. He also relied on the e-mails dated 24/09/2014, 25/09/2014, 18/09/2014 and 10/12/2014 exchanged between Fort Projects Private Limited and Emami Realty Limited to state that the entire transactions of taking money from Emami Realty was for the purpose of joint development and claimed that both the agreements dated 15/2/2016 and 26/2/2020 are nothing but joint venture agreement between the parties.

**8.2.** The respondents also claims that the Financial Creditor did not honor as per the terms of the agreement by not providing advance to Gagan Dealcom Private Limited as a result of which the entire housing project could not be undertaken, causing huge loss to the Corporate Debtor.

**8.3.** Ld. Counsel also submits that no payment was made to the tune of Rs.35 Crore to Gagan Dealcom Private Limited as stipulated in the first agreement.

**8.4.** It is stated that the bank statements submitted by the financial creditor would show that they are mere entries rented between Emami Capital Markets Limited and Emami Realty Limited through Fort Projects Private Limited. In any event, he submits that the claim of the Financial Creditor is barred by limitation.

**8.5.** It is further submitted that there is no reference to the loan agreement of 15/02/2016 in the new agreement dated 26/02/2020 and therefore the advance alleged to have been paid by FC pursuant to agreement dated 15/02/2016 is time barred and consequently this application has to be dismissed.

**9. Submission of the Ld. Counsel for the Applicant through Rejoinder Affidavit as:**

**9.1.** The Ld. Counsel for the Applicant has denied and disputed the averment made by the Respondent in its Reply affidavit and claimed that the total amount claimed to be defaulted and due comes within the ambit of Section 5(8) of the I&B Code and the in the Loan Agreement dated 15/02/2016, it was mentioned that Gagan Dealcom Pvt Ltd had borrowed a sum of Rs. 35 Crore from Sangita Fiscal Private Limited. Clause 5.4. of the Agreement dated 15/02/2016, envisages that Loan Amount would be disbursed in the name of Ganagn Dealcom Pvt Ltd.

**9.2.** Ld. Counsel for the Applicant has denied that there was any obligation of the Financial Creditor to pay any sum to Sangita Fiscal Private Limited, as alleged and also submitted that it is irrelevant as to whether the Financial Creditor has lent any sum to Gagan Dealcom Limited or not.

**10. Analysis and Findings:**

**10.1.** On perusal of documents submitted by the applicant and after hearing the Ld. Counsel for the applicant as well the respondents we find that pursuant to the Agreement made on 15/02/2016 a sum of Rs. 34.55 Crore has been advanced and there can be no dispute on the fact of payment as otherwise there is no reason for agreement dated 26/02/2020. The Bank Statements attached to the application also demonstrate payment to the Corporate Debtor by the Financial Creditor though the respondents made an attempt to brush it aside as mere entries entered between Emami Realty Limited and Emami Capital Market Limited through Fort Projects Private Limited, the Corporate Debtor.

**10.2.** Contrary to the claims made by the respondents the agreement dated 26/02/2020 clearly give reference to the earlier Loan Agreement dated 15/02/2016 in clause 1(vii) of the agreement titled as ‘Emami Loan Agreement’. In the said Agreement dated 26/02/2020, the rate of interest has been clearly agreed @15% per annum. We have found that the allegations raised by the Corporate Debtor regarding arrangement with Emami Capital Market Limited is not subject matter of the loan agreement dated 15/02/2016 and the subsequent loan agreement dated 26/02/2020 made between the FC and CD.

**10.3.** The e-mails relied by the respondents does not show that the transactions between the Financial Creditor and the Corporate Debtor are for the purpose of joint venture or joint development of real estate projects, as claimed.

**10.4.** We have perused in detail the agreement dated 15/02/2016 which forms the base of loan disbursement to the Corporate Debtor by the Financial Creditor. We find that word **'joint ventures'** has neither been used nor there is any contemplation of joint venture between the parties in both the agreements referred in this order.

**10.5.** The bank statement **annexed to the application at pages 70 and 71 (Annexure "I")** shows disbursement of **Rs. 34.55 Crore** by the Financial Creditor to the Corporate Debtor. The respondent in reply affidavit has admitted that such loan advanced in e-mail dated 23/11/2018 from Mr. Vivek Kathotia (Fort Projects) to financial creditor.

**10.6.** It is also a settled position of law that to establish a "financial debt", the statement of the disbursement of money is essential. In this context, we would refer Section 5(8) of the I&B Code, reproduced verbatim as:

**(8)** ***"financial debt"*** *means a debt along with interest, if any, which* ***is disbursed against the consideration for the time value of money*** *and includes*

**xxx** **xxx** **xxx** **xxx**

**10.7.** Further, we would rely upon the judgment of the Hon'ble Apex Court is the case of ***Anuj Jain* v. *Axis Bank Limited*** reported in **(2020) 8 SCC 401: MANU/SC/0228/2020** that:

> **"*The essentials for financial debt and financial creditor*'**
> **"43.** *Applying the aforementioned fundamental principles to the definition occurring in Section 5(8) of the Code, we have not an iota* ***of doubt that for a debt to become 'financial debt' for the purpose of Part II of the Code, the basic elements are that it ought to be a***

> ***disbursal against the consideration for time value of money*****.** ...... ***In any case, the definition, by its very frame, cannot be read so expansive, rather infinitely wide, that the root requirements of 'disbursement' against 'the consideration for the time value of money' could be forsaken in the manner that any transaction could stand alone to become a financial debt.*** *...***"**
>
> **(Emphasis Added)**

**10.8.** Further, we would rely upon the decision passed by this Tribunal in the matter of ***Kesoram Industries Ltd.* v. *Pratim Bayal, RP of Birla Tyres Ltd.* [I.A. (I.B.C) No. 957/KB/2023 In CP (IB) No. 250/KB/2021]** reported in **(2023) ibclaw.in 734 NCLT** that:

> **"6.8.** *Thus, from the statutory provisions and decisions supra, it is clear that* ***to bring any existence of debt within the ambit of the definition of "Financial Debt", disbursement of money is sine qua non*** **…"**
>
> **(Emphasis Added)**

**10.9.** Further, we are supported by the judgment of the Hon'ble Apex Court in the ***Innoventive Industries Ltd.* v. *ICICI Bank*** reported **in (2018) 1 SC 407: MANU/SC/1063/2017,** which clearly held that:

> **"28. …** *The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete,* **…."**
>
> **xxx xxx xxx xxx**
>
> **"30.** *On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, 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. It is of no matter that the debt is disputed so long as the debt is "due" i.e., payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise***."**
>
> **(Emphasis Added)**

**10.10.** After careful consideration of the various documents on record and contentions advanced by the Ld. Counsels for the applicant and the respondents, we find that there has been default of financial debt by the

Corporate Debtor which is in excess of threshold limit. Considering the reference made in the agreement dated 26/2/2020 about the agreement made on 15/2/2016, we find that the agreement 26/2/2020 is for continuation of the loan earlier advanced pursuant to the agreement dated 15/2/2016 along with Interest at the rate of 15% from 15/2/2016.

**10.11.** Therefore, we find that application has been filed within the time limit prescribed under the I&B Code in terms of the Agreement dated 26/02/2020, according to which the date default is 15/12/2021. The application filed under Section 7 of the I&B Code is complete in all respects and therefore, we allow the application and admit the same under section 7 of the Insolvency and Bankruptcy Code, 2016.

**11.** In the light of the facts stated in the application bearing CP (IB) No. 264/KB/2022, and the evidence placed on record and the discussion hereinabove, we **allow** this application filed under **Section 7 of I&B Code**, and accordingly, we order the initiation of **Corporate Insolvency Resolution Process (CIRP)** in respect of the Corporate Debtor by the following **Orders**:

**i.** The Application filed by the **Emami Realty Limited (Financial Creditor),** under Section 7 of the Insolvency & Bankruptcy Code, 2016, is hereby, **admitted** for initiating the **Corporate Insolvency Resolution Process** in respect of **Fort Projects Private Limited (Corporate Debtor).**

**ii.** As a consequence of this Application being admitted in terms of Section 7 of the I&B 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.** Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016, prohibits the following, as:

***a)*** *The institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment 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 asset 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.*

*[Explanation.--For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;]*

**iv.** The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

**v.** The provisions of sub-section (1) of the Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

**vi.** The Applicant has proposed the name of **<u>Mr. Kannan Tiruvengadam</u>, [Registration no.: IBBI/IPA-001/IP-P00253/2017-2018/10482, Address: Netaji Subhas Villa Flat No. 3C, 3rd Floor, 18 Karunamoyee Ghat Road Near Dharapara Tollygunge, Kolkata, West Bengal ,700082], Email ID: <u>calkannan@gmail.com</u>,** as the "IRP". We have perused that there is a written communication, annexed as **Annexure "E"** at **Page 25,** to this 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 in the ICAI (Institute of Chartered Accountants of India). In addition, further necessary disclosures have been made by Mr. Kannan Tiruvengadam 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. Kannan Tiruvengadam** as the **Interim Resolution Professional** (IRP) of the Corporate Debtor to carry out the functions as per the I&B 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. 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 I&B Code.

**vii.** In pursuance of Section 13 (2) of the Code, we direct the IRP or the RP, as the case shall cause a public announcement immediately with regard to the admission of this application under Section 7 of the Code and **call for the submission of claims** under Section 15 of the Code. The public announcement referred to in Clause (b) of sub-section (1) of Section 15 of Insolvency & Bankruptcy Code, 2016, shall be made immediately. 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.

**viii.** During the CIRP period, the management of affairs 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 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.

**ix.** The Interim Resolution Professional is also free to take police assistance to take full charge of the Corporate Debtor, its assets and its documents without any delay, and this Court hereby directs the concerned Police Authorities and/or the Officer-in-Charge of Local Police Station(s) to render all assistance as may be required by the Interim Resolution Professional in this regard.

**x.** 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 Corporate Debtor.

**xi.** The Financial Creditors shall be liable to pay to IRP a sum of **Rs. 3,00,000/-** (Rupees Three Lakh Only) as payment of his fees as advance, as per Regulation 33(3) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, which amount shall be adjusted at the time of final payment. The expenses relating to the CIRP are subject to the approval of the Committee of Creditors (CoC).

**xii.** In terms of sections 7(5) and 7(7) of the Code, the **Registry of this Adjudicating Authority** is hereby directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the Interim Resolution Professional by Speed Post and through email immediately, and in any case, not later than two days from the date of this Order.

**xiii.** Additionally, the **Registry of this Adjudicating Authority** shall serve a copy of this Order upon the Insolvency and Bankruptcy Board of India (IBBI) for their record and also upon the Registrar of Companies (ROC), 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.

**xiv.** The Resolution Professional shall conduct CIRP in time-bound manner as per Regulation 40A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016.

**xv.** The IRP/RP shall be liable to submit the periodical report including the minutes of the CoC of the Corporate Debtor, with regard to the progress of the CIRP in respect of the Corporate Debtor to this Adjudicating Authority time to time.

**xvi.** The order of moratorium shall cease to have effect as per Section 14(4) of the I&B Code.

**12.** Urgent certified copy of this order, if applied or, be supplied to the parties, subject to compliance with all requisite formalities.

**13.** Post the matter on **22/12/2023** for filing the Periodical Progress Report by the IRP/RP.

**Arvind Devanathan**
**Member (Technical)**

**Bidisha Banerjee**
**Member (Technical)**

**This Order is signed on 09th Day of November, 2023.**

hb./ Bose, R. K. [LRA]