



**NATIONAL COMPANY LAW TRIBUNAL**

**COURT- V, MUMBAI BENCH**

**C.P. No. 337/IB/MB/2020**

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 Modi Builders,**

1022, ShukrawarPeth, Modi Tower,  
Tilak Road, Pune-411002

**... Applicant/Financial Creditor**

V/s.

**Refrigeration and Electrical Appliances,  
(India) Private Limited,**

152, Racold Factory, Mumbai-Pune Road,  
Pimpri, Pune-411018

**... Respondent/(Corporate Debtor)**

**Order Delivered on 08.05.2023**

**Coram:**

Hon'ble Shri. Kuldip Kumar Kareer, Member (Judicial)

Hon'ble Smt. Anuradha Sanjay Bhatia, Member (Technical)

**Appearances (Via Videoconferencing):**

For the Petitioner : Adv. Madhumita Patil i/b Adv. Amol Nehru

For the Corporate Debtor: Adv. Vivek Kantawala

**Per: Shri. Kuldip Kumar Kareer, Member (Judicial)**

**ORDER**

1. The Respondent Company, **Refrigeration and Electrical Appliances (India) Private Limited** (*hereinafter*, "Corporate Debtor") is a private limited company, having CIN U51900MH1940PTC005132, incorporated



under the Companies Act, 1956 on 17.08.1940 with nominal share capital of Rs. 10,00,00,000/- and Paid-Up Share Capital of Rs. 18,48,000/-.

2. The Applicant Firm, **M/s. Modi Builders** (*hereinafter*, “Petitioner”) advanced a loan to the Corporate Debtor to carry out its activities. The Financial Creditor advanced a loan of Rs. 45,00,000/- in favour of the Corporate Debtor on 31<sup>st</sup> December, 2007. The aforesaid transaction was effectuated through Syndicate Bank via Account Number 53241010004137. As per the balance sheet for year ending 31<sup>st</sup> March, 2008, reflected the Corporate Debtor’s liability to repay the amount of Rs. 46,02,479/-.
3. The balance sheet for year ending 31<sup>st</sup> March, 2009 reflects the liability of the Corporate Debtor to repay an amount of Rs. 50,10,581/-. The balance sheet for year ending 31<sup>st</sup> March, 2010 reflects liability of the Corporate Debtor to repay an amount of Rs. 55,41,027/-. The balance sheet for the year ending 31<sup>st</sup> March, 2011, reflects liability of the Corporate Debtor to repay an amount of Rs, 62,89,066/-.
4. Subsequently, on 15<sup>th</sup> October, 2011, another loan of Rs. 2,00,000/- was advanced by the Financial Creditor in favour of the Corporate Debtor via Bank of Maharashtra bearing Account Number 60021736039. The balance sheets for year ending 31<sup>st</sup> March, 2012 reflects the liability to repay loan amount of Rs. 73,52,844/-. The balance sheet for the year ending 31<sup>st</sup> March, 2012 reflects the liability to repay loan amount of Rs. 83,45,477/-. The balance sheet for the year ending 31<sup>st</sup> March, 2014 reflects the liability to repay loan amount of Rs. 94,72,117/-.
5. The balance sheet for the year ending 31<sup>st</sup> March, 2015, reflects the liability to repay the amount of Rs. 1,07,50,853/-. The balance sheet for the year ending 31<sup>st</sup> March, 2016 reflects the liability to repay the amount of Rs. 1,22,06,194/-. The balance sheet for the year ending on 31<sup>st</sup> March, 2017 reflects the liability to repay loan amount of Rs. 1,38,54,030/-. The



balance sheet for the year ending on 31<sup>st</sup> March 2018 reflects the liability to repay loan amount of Rs. 1,57,24,324/-.

6. The ledger account of the Financial Creditor from 1<sup>st</sup> April, 2005 to 31<sup>st</sup> March, 2019 establishes that the loan was advanced to the Corporate Debtor.
7. The Corporate Debtor accepted its liability to repay the loan amount along with interest amounting to Rs. 1,57,24,324/- as on 31<sup>st</sup> March, 2018, vide its balance sheets (financial statements) wherein the loan payable to the Financial Creditor along with interest has been specified and the same financial statements have been signed and approved by the Corporate Debtor. The Corporate Debtor has failed to repay the loan amount and the interest thereon. The date of default of the loan is 1<sup>st</sup> April, 2018.
8. Hence, the Financial Creditor (Applicant) is submitting this application to initiate a corporate insolvency resolution process in the aforesaid matter.

#### **Reply Filed by the Corporate Debtor**

9. The Corporate Debtor has filed a detailed reply opposing the Company Petition. The Corporate Debtor submits that the present Petition is not maintainable and is liable to be dismissed on account of non-occurrence of default.
10. As per the definition, “*default*” would mean where the debt has become due and payable and is not paid by the debtor. This particular definition specifically contemplates that the debt occurs where there is a clear agreement of a debt between the parties and the repayment as per that particular agreement/ arrangement after becoming due has not been paid and only in that event, the default can occur. This particular event of default is a precondition and a necessity to trigger Section 7 of IBC.
11. Under Section 7(4), the Adjudicating Authority is required to ascertain the existence of a default on the basis of either information or a record



available with information utility or on the basis of the evidence furnished by the Financial Creditor. Under Section 7(5) of IBC it is clear that provisions of this Code qua Financial Creditor can only be triggered in the event of occurrence of default.

12. The present Application is filed by the Applicant under Section 7 of IBC alleging the claim and “*default*” of Rs. 1,57,24,324/. The date of default alleged by the Applicant is 1<sup>st</sup> April 2018. The Applicant has relied on its own bank statements along with financial statements of the Corporate Debtor. The documents annexed by the Applicant gravely fail in establishing any financial debt and consequently default of the same.
13. No agreement has been produced on record to establish any financial debt or to indicate any relationship between the Applicant and the Respondent of a Financial Creditor and the Corporate Debtor between the parties.
14. It is further submitted that the Applicant is a partnership firm having its partners as Mr. Ramesh S. Modi and Mr. Bharat S. Modi. Mr. Ramesh S. Modi both partners holds 2,722 equity shares representing 15% of the total shareholding in the Respondent Company on behalf of Applicant M/s. Modi Builders. Mr. Bharat S. Modi holds 2,722 equity shares representing 15% of the total shareholding in the Respondent Company on behalf of Applicant M/s. Modi Builders. In view of the fact that the Applicant holds the 30% equity shareholder of the Respondent Company, the debt claimed by the Applicant cannot be qualified as financial debt under IBC.
15. ‘Form I’ has been signed by Mr. Ramesh Shantilal Modi in capacity of partner of the Applicant. It is submitted that the said Ramesh Shantilal Modi is also a director of the Respondent since 30<sup>th</sup> June 2005 till date and therefore, the Applicant cannot maintain its Petition in its capacity of an alleged Financial Creditor where the partner is holding the equity on behalf of the partnership firm acting in fiduciary duty as a director. For this reason, the Petition is not maintainable and is liable to be dismissed.



16. The Respondent further states that there is no financial “debt” nor there is any “default” and there is no liability of any sort towards payment or repayment towards the Applicant on account of various disputes between the Applicant, its partners and other shareholders of the Company. In the end, a prayer for dismissal of the petition has also been made.

### **FINDINGS**

17. During the course of arguments, Ld. Counsel for the petitioner has argued that the existence of financial debts stands proved from the documents relied upon by the petitioner. In this regard, the Counsel for the petitioner has referred to the balance sheets of the Corporate Debtor from March, 2009 onwards wherein the existence of the loan availed by the Corporate Debtor from the petitioner is dully acknowledged from time to time. It is also indicated in the balance sheet that interest was also payable on the principle sum and the same was dully credited every year due to which total amount outstanding stood enhanced to Rs. 1,57,24,324/-. Counsel for the petitioner further contented that in the given circumstances the existence of the financial debts and its default stand proved on record and therefore, the petition deserves to be admitted.

18. On the other hand, the Counsel for the respondent has argued that there is no financial debt nor any default has been committed by the Corporate Debtor. Moreover, the petitioner has failed to make out a case of default as it has not been proved as to when the default took place nor any such allegation has been made in the petition. According to the Counsel for the respondent, the petition deserves to be dismissed on this ground alone.

19. We have heard the contention raised by the counsel for the parties and carefully gone through the record.

20. In order to prove the existence of the debts, the petitioner has not relied upon any loan document which might have been executed between the parties. The petitioner has only relied upon the audited balance sheet of



the Corporate Debtor, whereby the existence of the loan has been acknowledged from time to time right up to 31.03.2018 and the audited balance sheet of the said year shows that a sum of Rs. 1,57,24,324/- was outstanding as loan as on 31.03.2018. Therefore, the existence of the Financial Debt stands established on record as it stands admitted by the Corporate Debtor as reflected in the balance sheet for the year ending 31.03.2018 (Annexure- IC) attached with the petition. It is further evident from the record that as a matter of fact the existence of the financial debt has been acknowledged by the Corporate Debtor in its balance sheet right from the year 31.03.2018 onwards.

21. During the course of the argument, the Counsel for the Corporate Debtor has argued that the Petitioner has failed to establish the date of default. In this regard, it has been pointed out in Part IV of the petition that the date of default is mentioned as 01.04.2018 but there is no document on record which could show that loan was repayable on 01.04.2018. Therefore, according to the Counsel for the Corporate Debtor, the said date cannot be treated as the date of default.
22. We have considered the aforesaid contention of the Counsel for the Corporate Debtor. Since no loan agreement or any other document under which the unsecured loan was advanced by the Corporate Debtor has been placed on file, it is not clear as to what were the terms of the loans nor there is anything on record which could suggest as to when the loan was repayable. The Petitioner has nowhere claimed in the Petition that any notice, etc was given to the Corporate Debtor calling upon it to make the payment. It appears that the petitioner has fictitiously assumed the date of default as 01.04.2018 which does not appear to be correct.
23. As per the provisions of the Code, default occurs on a date when the debt becomes repayable and is not paid by the borrower. There is no evidence of the fact as to when the debt became due. In addition to this, no notice is ever shown to have been given to the Corporate Debtor any time prior to the filing of the Petition demanding the repayment of the loan. In these



circumstances, it is to be held that the Petitioner has failed to prove the essential ingredient i.e. the date of default. In this regard, a reference can also be made to the law laid down by the Hon'ble Supreme Court in *Indus Biotech Private Limited vs Kotak India Venture (Offshore)*, Arbitration Petition (Civil) No. 48/2019 decided on 26th March 2021 whereby it has been held by the Hon'ble Supreme Court that the procedure contemplated under the Code indicates that the Adjudicating Authority is required to be satisfied as to whether the default has occurred or not and if the default has not occurred and the debt is not due and if there is no default, the Adjudicating Authority shall reject the application as provided under Sub-Section (5) (b) of Section 7 of the Code. In the instant case also, though the existence of debt appears to have been established from the balance sheets of the Corporate Debtor, there is no evidence as to when the same is repayable nor any demand has been made by the petitioner any time prior to the filing of the Petitioner and from these circumstances, it can be inferred that the default had not occurred as yet due to which the Petition under Section 7 can be triggered. Therefore, in our considered view, the present petition deserves to be dismissed on this short ground.

24. Accordingly, the above Company Petition is '**dismissed**' being devoid of merit.

SD/-  
**ANURADHA SANJAY BHATIA**  
**MEMBER (TECHNICAL)**

SD/-  
**KULDIP KUMAR KAREER**  
**MEMBER (JUDICIAL)**