

**THE NATIONAL COMPANY LAW TRIBUNAL
“CHANDIGARH BENCH, CHANDIGARH”
(Exercising powers of Adjudicating Authority under
the Insolvency and Bankruptcy Code, 2016)**

CP (IB) No. 90/Chd/CHD/2018

**Under Section 7 of Insolvency and
Bankruptcy Code, 2016.**

In the matter of :

M/s V.I.R. Foods Ltd.,
SCO 25, Sector 26,
Madhya Marg,
Chandigarh-160019

...Financial Creditor

Versus

M/s White Water Hospitality
Private Limited,
SCO 2437, Sector-22 C,
Chandigarh-160022.

...Corporate Debtor

Judgement delivered on: 21.11.2019

**Coram: HON'BLE MR. AJAY KUMAR VATSAVAYI, MEMBER (JUDICIAL)
HON'BLE MR. PRADEEP R. SETHI, MEMBER (TECHNICAL)**

For the petitioner : 1. Mr. Aditya Grover, Advocate.
2. Ms. Ritika Garg, Authorized Representative.

For the respondent : 1. Mr. Anand Chhibbar, Senior Advocate.
2. Mr. Gaurav Mankotia, Advocate.
3. Mr. Pulkit Jain, Advocate.
4. Mr. Sahil Sharma, Advocate.

Per: Ajay Kumar Vatsavayi, Member (Judicial)

JUDGMENT

The application in the prescribed Form No.1 is filed by V.I.R. Foods Limited (hereinafter referred to as '**Financial Creditor**') for initiation of Corporate Insolvency Resolution Process (**CIRP**) in the case of M/s White

Water Hospitality Private Limited (hereinafter referred to as **Corporate Debtor**). The application is filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (**Code**) read with Rule 4 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The Financial Creditor is a company with its registered office at Chandigarh and its CIN No. is U15310CH2005PLC02846. The application is signed by Ritika Garg, Company Secretary/Authorized Representative of M/s V.I.R. Foods Ltd. Her affidavit verifying the contents of the application is at pages 33 to 36 of the petition. The Board resolution authorizing Ritika Garg to file the case/application against the corporate debtor on behalf of the financial creditor to nominate, appoint and engage advocates, solicitors, counsel or other professionals (including but not restricted to Insolvency Professional) and retainers and to do all other acts, deeds, matters and things necessary/incidental/consequential and ancillary in this behalf and also ratifying her actions already undertaken, is filed as Annexure A-1, vide Diary No.1395 dated 03.05.2018.

2. The copy of certificate of incorporation and master data of corporate debtor is at Annexure A-3 of the petition. The corporate debtor is stated to be incorporated on 13.07.2009 and the registered address is stated to be at SCO 2437, Sector 22 C, Chandigarh-160022. Therefore, the jurisdiction lies with this Bench of the Tribunal.

3. It is stated that upon specific approach made by the corporate debtor to the financial creditor, the financial creditor advanced a sum of INR 2,00,00,000/- at a rate of 18 percent simple interest per annum, in two equal

halves on 3rd May 2012 and 4th May 2012. And the corporate debtor repaid a sum of INR 1,62,50,000/- on 26th June 2012 towards the principal. This inspired the confidence of the financial creditor in the sound cash flow working of the corporate debtor. On further request of the corporate debtor the financial creditor advanced a financial assistance of INR 5,50,000/- on 5th January 2013. A Memorandum of Understanding (MOU) dated 02.05.2012 was also entered between the parties with regard to the inter-corporate loan facility rendered by financial creditor to the corporate debtor. However, it was mutually agreed between the parties that the running account of inter corporate loan facility will be squared off by the end of the financial year 2014-15. Due to delay in payments by the corporate debtor and being non responsive to the calls of the financial creditor, the financial creditor was forced to perceive the non-availability of funds with the corporate debtor. Earlier, the petitioner-financial creditor had preferred a similar petition bearing No.CP(IB) No.101/Chd/CHD/2017, which was ordered to be dismissed as withdrawn with liberty to file fresh by this Hon'ble Tribunal vide its order dated 15.12.2017 (Annexure A-14).

4. It is further stated that total amount unpaid financial debt is ₹52,64,161.64/- (Rupees Fifty Two Lakhs Sixty Four Thousand One Hundred Sixty One and Sixty Four Paisa only) as on 31.12.2017. Out of which ₹18 Lacs fell due as on 28.02.2015, as the last payment of ₹10 Lac in the running account maintained with the application was made by the corporate debtor on 27.02.2015. Further, ₹34,64,161.64/- (Rupees Thirty Four Lacs Sixty Four Thousand One Hundred Sixty One and Sixty Four Paisa Only) stands payable

by the corporate debtor on account of interest levied @18% p.a. (daily simple interest) on the total advanced loan alongwith outstanding principal due and payable to the applicant as on 31.12.2017. Thus, financial debt of ₹52,64,161.64/- (Rupees Fifty Two Lacs Sixty Four Thousand One Hundred Sixty One and Sixty Four Paisa only) stands payable by the corporate debtor to the applicant as on 31.12.2017. The calculation sheet is filed as Annexure A-6 at Page 44 of the paper book.

5. The respondent-corporate debtor while denying the CP averments, raised various grounds and submitted that the instant petition is liable to be dismissed in view of said grounds.

6. We have heard the learned counsel for the petitioner and learned senior counsel for the respondent and have perused the pleadings on record.

7. The learned senior counsel appearing for the respondent-corporate debtor, *inter alia*, raised the following grounds in support of his averments.

- i.) The petition is not filed by a valid and properly authorized person.
- ii.) The CP is liable to be dismissed as the same is barred by the period of limitation.
- iii.) There is no time value of money involved in the transactions between the petitioner and respondent-corporate debtor and hence, the CP is not maintainable.

- iv.) The petitioner concealed various facts from this Tribunal and also misrepresented before this Tribunal, thus, CP is liable to be dismissed. The documents relied upon by the petitioner are forged and fabricated documents.
 - v.) The alleged debt is not a financial debt and the petitioner is not a financial creditor.
8. (i) The instant petition is filed by Ritika Garg. The Board Resolution authorizing Ritika Garg to file the case/application against the corporate debtor on behalf of financial creditor, to nominate, appoint and engage Advocates, Solicitors, counsel or other professionals (including but not restricted to Insolvency Professionals) and to do all other deeds, matters and things necessary/incidental/consequential and ancillary in this behalf and also ratifying actions already undertaken, is filed as Annexure A-1 vide Diary No.1395 dated 03.05.2018. In ***Palogix Infrastructure Pvt. Ltd. Versus ICICI Bank Limited; Company Appeal (AT) (Insol.) No.30 of 2017***, dated 22.04.2017, the Hon'ble National Company Law Appellate Tribunal while considering the petition filed by Power of Attorney holder as well as Authorized Representative held that "*Power of Attorney Holder' is not empowered to file application under section 7 of the 'I&B Code', but an authorised person has power to do so*". In view of this decision and other decisions of Hon'ble National Company Law Appellate Tribunal, wherein Palogix Infrastructure (Supra) decision has been followed and in view of the Board Resolution authorizing Ms. Ritika

Garg, the contention of the learned senior counsel for the respondent that the petition is filed by an unauthorized person is untenable.

(ii) As per clause 04 of the MOU dated 02.05.2015, the corporate debtor shall repay the financial assistance from the financial creditor as and when recalled by the financial creditor. The petitioner filed CP(IB) No.101/Chd/CHD/2017 on 11.07.2017. Therefore, we can say that the financial assistance was recalled on 11.07.2017. Since, the instant CP(IB) No.90/Chd/Chd/2018 was filed on 16.03.2018, it can't be said that the same is barred by limitation.

(iii) A Memorandum of Understanding (MOU) is stated to be executed between the parties on 02.05.2012. It is contended by the petitioner that as per Clause 1 of the said Memorandum of Understanding, the respondent-corporate debtor is under obligation to pay interest @ 18% per annum to the petitioner on the loan amount and hence, the same satisfies the requirement of time value of money. The respondent-corporate debtor contended that the said MOU was not filed along with the first petition i.e. CP(IB) No.101/Chd/CHD/2017 and hence the same is an afterthought and a fabricated document. It is further stated on behalf of the corporate debtor that its books of accounts have not shown any interest as alleged to have been provided under the MOU. But once the MOU executed between the parties provides for payment of interest, the requirement of time value of money, as per the Code, is satisfied. Accordingly, we reject this contention of respondent also.

(iv) The various contentions raised by the respondent-corporate debtor with regard to fabrication and forgery of documents by the petitioner and also various allegations with regard to transactions entered into between the parties, need not be gone into in detail for the purpose of consideration of admission of this CP under the provisions of the Code and the Regulations made thereunder and in view of the clear admission of the debt amount of ₹43 lacs by the corporate debtor to the petitioner-financial creditor under the heading unsecured loan in Annexure A-16 i.e. Auditor's report of the respondent-corporate debtor itself. For the same reason there is no necessity to delve upon the other contentions of the respondent-corporate debtor that there is no debt due and payable to the petitioner.

(v) In ***Shailesh Sangani Versus Joel Cardoso and Others;*** **2019 SCC OnLine NCLAT 52**, passed on 30.01.2019, the Hon'ble National Company Law Appellate Tribunal, dealing with the issues of 'financial debt' and 'financial creditor' in somewhat identical circumstances, held as under:-

"A plain look at the definition of 'financial debt' brings it to fore that the debt alongwith interest, if any, should have been disbursed against the consideration for the time value of money. Use of expression 'if any' as suffix to 'interest' leaves no room for doubt that the component of interest is not a sine qua non for bringing the debt within the fold of 'financial debt'. The amount disbursed as debt against the consideration for time value of money may or may not be interest bearing. What is material is that the disbursement of debt should be against consideration for the time value of money. Clauses (a) to (i) of Section 5(8) embody the nature of transactions which are included in the definition of 'financial debt'. It includes money borrowed against the payment of interest. Clause (f) of

Section 5(8) specifically deals with amount raised under any other transaction having the commercial effect of a borrowing which also includes a forward sale or purchase agreement. It is manifestly clear that money advanced by a Promoter, Director or a Shareholder of the Corporate Debtor as a stakeholder to improve financial health of the Company and boost its economic prospects, would have the commercial effect of borrowing on the part of Corporate Debtor notwithstanding the fact that no provision is made for interest thereon. Due to fluctuations in market and the risks to which it is exposed, a Company may at times feel the heat of resource crunch and the stakeholders like Promoter, Director or a Shareholder may, in order to protect their legitimate interests be called upon to respond to the crisis and in order to save the company they may infuse funds without claiming interest. In such situation such funds may be treated as long term borrowings. Once it is so, it cannot be said that the debt has not been disbursed against the consideration for the time value of the money. The interests of such stakeholders cannot be said to be in conflict with the interests of the Company. Enhancement of assets, increase in production and the growth in profits, share value or equity enures to the benefit of such stakeholders and that is the time value of the money constituting the consideration for disbursement of such amount raised as debt with obligation on the part of Company to discharge the same. Viewed thus, it can be said without any amount of contradiction that in such cases the amount taken by the Company is in the nature of a 'financial debt'”

In view of the decision of the Hon'ble National Company Law Appellate Tribunal in Shailesh Sangani case (Supra), in our view, the contention of the respondent-corporate debtor that the petitioner is not a financial creditor and the debt due is not a financial debt is also to be rejected.

9. In view of the aforesaid facts and admission of debt by the respondent-corporate debtor, various decisions on which the learned counsel for the respondent has placed reliance have no application to the instant case.

10. The Hon'ble Supreme Court in the case of ***Innoventive Industries Ltd. Versus ICICI Bank and Another; (2018) 1 Supreme Court Cases 407***, held as under:-

- “27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of “debt”, we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a “claim” and for the meaning of “claim”, we have to go back to Section 3(6) which defines “claim” to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5(21) means a claim in respect of provision of goods or services.
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. It is at the stage of Section 7(5), where the adjudicating authority is to be

satisfied that 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.

29. *The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing—i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.”*

i.) Section 7(5)(a) of the Code is as follows:-

*“(5) Where the Adjudicating Authority is satisfied that—
(a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order admit such application.”*

ii.) The application filed in the prescribed Form No. I is found to be complete.

iii.) The proposed Interim Resolution Professional Mr. Madan Gopal Jindal has filed Form No.2 (Annexure A-13 of the petition) certifying that there are no disciplinary proceedings pending against him with the Board so far or ICSI Insolvency Professional Agency (CSI). The Law Research Associate of

this Tribunal has checked the credentials of Mr. Madan Gopal Jindal and there is nothing adverse against him.

iv.) The conditions provided for in Section 7(5)(a) of the Code being satisfied in the present case, we direct that the application for initiation of CIRP against White Water Hospitality Private Limited be admitted. The directions regarding moratorium and appointment of IRP are given below.

v.) We declare the Moratorium in terms of sub-section (1) of Section 14 of the Code as under:-

- (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 assets 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;

- (d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

vi.) It is further directed that 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. The provisions of Section 14(3) shall however, not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator and to a surety in a contract of guarantee to a corporate debtor.

vii.) The order of moratorium shall have effect from the date of this order till completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of corporate debtor under Section 33 as the case may be.

viii.) The following directions are issued in respect of the appointment of the Interim Resolution Professional:-

- i.) Appoint Mr. Madan Gopal Jindal, resident of SCO 7-8, 4th Floor, Jandu Tower, Miller Ganj, G.T. road, Ludhiana, Punjab having Registration No. IBBI/IPA-002/IP-N00137/2017-18/10352; and email address: mgiindal@gmail.com Mobile No. 9814170354 as an Interim Resolution Professional.

- ii.) The term of appointment of Mr. Madan Gopal Jindal shall be in accordance with the provisions of Section 16(5) of the Code;
- iii.) In terms of Section 17 of the Code, from the date of this appointment, the powers of the Board of Directors shall stand suspended and the management of the affairs shall vest with the Interim Resolution Professional and the officers and the managers of the Corporate Debtor shall report to the Interim Resolution Professional, who shall be enjoined to exercise all the powers as are vested with Interim Resolution Professional and strictly perform all the duties as are enjoined on the Interim Resolution Professional under Section 18 and other relevant provisions of the Code, including taking control and custody of the assets over which the Corporate Debtor has ownership rights recorded in the balance sheet of the Corporate Debtor etc. as provided in Section 18 (1) (f) of the Code. The Interim Resolution Professional is directed to prepare a complete list of inventory of assets of the Corporate Debtor;
- iv.) The Interim Resolution Professional shall strictly act in accordance with the Code, all the rules framed thereunder by the Board or the Central Government and in accordance with the Code of Conduct governing

his profession and as an Insolvency Professional with high standards of ethics and moral;

- v.) The Interim Resolution Professional shall cause a public announcement within three days as contemplated under Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 of the initiation of the Corporate Insolvency Resolution Process in terms of Section 13 (1) (b) of the Code read with Section 15 calling for the submission of claims against 'Corporate Debtor';
- vi.) It is hereby directed that the Corporate Debtor, its Directors, personnel and the persons associated with the management shall extend all cooperation to the Interim Resolution Professional in managing the affairs of the Corporate Debtor as a going concern and extend all cooperation in accessing books and records as well as assets of the Corporate Debtor;
- vii.) The Interim Resolution Professional shall after collation of all the claims received against the corporate debtor and the determination of the financial position of the corporate debtor constitute a Committee of Creditors and shall file a report, certifying constitution of the

Committee to this Tribunal on or before the expiry of thirty days from the date of his appointment, and shall convene first meeting of the committee within seven days of filing the report of constitution of the committee; and

- viii.) The Interim Resolution Professional is directed to send regular progress report to this Tribunal every fortnight.

A copy of this order be communicated to both the parties. The learned counsel for the petitioner shall deliver copy of this order to the Interim Resolution Professional forthwith. The Registry is also directed to send copy of this order to the Interim Resolution Professional at his email address forthwith.

Sd/-
(Pradeep R. Sethi)
Member (Technical)

Sd/-
(Ajay Kumar Vatsavayi)
Member (Judicial)

November 21st 2019
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