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NATIONAL COMPANY LAW TRIBUNAL

KOLKATA BENCH

KOLKATA

CP(IB) No. 984/KB/2018

In the matter of:

M/s. JB Marketing Pvt. Ltd. and Others

.. Applicant/ Financial Creditor

Vs.

M/s. Sree Kamakhya Tea Co. Pvt. Ltd.

.. Corporate Debtor

Coram: Shri Madan B Gosavi, Member(Judicial)

Shri Virendra Kumar Gupta, Member(Technical)

For the Financial Creditor :

1. Mr. Sounak Mitra, Advocate
2. Mr. Saurav Jain, Advocate

For the Corporate Debtor :

1. Mr. Arik Banerjee, Advocate
2. Mr. Rajib Mullick, Advocate

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3. Mr. Rakesh Sankar, Advocate

Date of Pronouncement of the Order : 21/11/2019

ORDER

Per Shri Madan B Gosavi, Member(Judicial)

1. M/s. JB Marketing Pvt. Ltd., M/s. Cynosure Mercantile Private Limited and M/s. Dream Estate & Holding Pvt. Ltd., jointly filed this Application under Section 7 of the Insolvency & Bankruptcy Code against M/s. Sree Kamakhya Tea Co. Pvt. Ltd. to start its Corporate Insolvency Resolution Process (in short CIRP) on the ground that the Corporate Debtor committed default in paying the financial debt of Rs. 30 lakh (Rupees Thirty Lakh) together with interest accrued thereon.

2. It is not in dispute that earlier to this proceeding, the Financial Creditors had filed CP(IB) No. 561/KB/2017, under Section 7 of the Code, against the Corporate Debtor. However, settlement was arrived at in between the parties and the Financial Creditors withdrew that Application. The Financial Creditors submitted that despite that, the Corporate Debtor did not pay the debt as per MOU dated 30-11-2017. Hence this proceeding is filed.

3. The Financial Creditors further state that on 23-02-2013, 28-01-2013 and 31-01-2013, they granted and disbursed in favour of the Corporate Debtor an amount of Rs. 10 Lakh each. The said loan was repayable on 31-12-2014. It was not paid in time. Earlier, the CP was filed but later on withdrawn upon settlement.

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4. To initiate this proceeding against the Corporate Debtor, the Financial Creditors filed on record, MOU dated 30-11-2017. They state that since the Corporate Debtor made default in paying the debt it may be admitted in CIRP. They suggested the name of one Mr. Jitendra Lohia, IBBI registration No. IBBI/IPA-001/IP-P00170/2017-18/10339, for appointment as Interim Resolution Professional against whom no disciplinary proceeding appears to be pending.

5. Upon service of notice of this Application, the Corporate Debtor appeared through its Director, Mr. Shiv Kumar Kanoi. He filed affidavit in reply. We perused the same.

6. There appears no dispute relating to the existence of debt and its default by the Corporate Debtor, as in Paragraph 6 of the affidavit in reply, the Corporate Debtor stated that :

Paragraph : 6

"I state that the said sum of Rs. 30 Lakh which is the subject matter of dispute in the instant proceeding was granted on the basis of long standing friendly business relationship existing between the parties. The understanding was such that every year from the time such money was provided as friendly accommodation such sum were to be renewed every year by the corporate debtor by way of issuing new cheques replacing the old ones with the new ones. The corporate debtor was only required to pay interest at the rate of 15% p.a. and nothing else."

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7. In Paragraph 9 of the reply, the Corporate Debtor further contended that it has signed some blank cheques and given to the Financial Creditors as security. They were not supposed to be deposited but the Financial Creditors deposited the cheques and they were dishonoured.

8. In our considered opinion, the above admission on behalf of the Corporate Debtor about existence of debt and its default is sufficient to admit the Corporate Debtor in CIRP process. However, the Corporate Debtor raised defense that the Financial Creditors cannot give such loan in violation of provisions of Section 186 of the Companies Act, 2013. The MOU dated 30-11-2017 is manufactured and false document. The claim based on such MOU is not maintainable.

9. We heard the Ld. Counsel for the Financial Creditors, the Ld. Counsel for the Corporate Debtor, at length. We perused the records.

10. From the pleadings of the parties, there appears no dispute to the fact that the Corporate Debtor is liable to pay financial debt of more than Rs. 30 lakh and it has committed default in paying the same. The debt was to be repaid on 31-03-2014. However, the Corporate Debtor, in its reply dated 18-07-2017, had acknowledged and admitted the debt. Even prior to that, on 31-03-2017, it has acknowledged the debt in writing. This proceeding is filed on 27-07-2018. It is filed well within three years from the last

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acknowledgement of the debt, by way of notice reply dated 28-07-2018.

11. The Ld. Counsel for the Corporate Debtor mainly raised the point that since MOU dated 30-11-2017 is forged and fabricated, this proceeding is not maintainable. To buttress his argument, he relied on Hon'ble Supreme Court Ruling, in Arbitration Case No. 34 of 2013, in between Swiss Timing Limited Vs. Organising Committee and Others, and also two Orders of Hon'ble NCLAT, in Company Appeal (AT) No. 243 of 2017 and Company Appeal(AT) No. 375 of 2018. The Ld. Counsel for the Corporate Debtor put before us very novel argument by submitting that since his client denied having executed MOU, alleging that it is forged, it is for the Financial Creditors to prove that the document is genuine. However, according to us, the cardinal principle of Evidence Laws stating that who alleges the forgery, has to prove the same. Be that as it may, the MOU cannot be said to be forged and fabricated because the Corporate Debtor himself admitted having executed the MOU on 30-11-2017 in its letter dated 06-12-2017 (Page 55 of Paper Book). Apart from above, if we keep the MOU out of consideration, still evidence on record is sufficient to establish that the debt of more than Rs. 1 lakh is due and payable by the Corporate Debtor to the Financial Creditors and the Corporate Debtor committed default. The claim is filed within the limitation.

The Corporate Debtor contends that Section 186 of the Companies Act, 2013 does not permit the Financial Creditors to file such Application. In our considered opinion, having received the loan, the

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Corporate Debtor cannot challenge its validity on such ground. Moreover, we have already held in the case of Religare Finvest Ltd. Vs. Bharat Road Network Ltd., in CP(IB) No. 540/KB/2018, as well as, in the case of Allied Broad Band Services Pvt. Ltd. Vs. Manthan Broad Band Services Pvt. Ltd., in CP(IB) No. 1634/KB/2018, that the Corporate advance given by the Company, without resorting to the provisions of Section 186 of the Companies Act, 2013, is the valid claim within the meaning of Section 3(6) of the Insolvency & Bankruptcy Code, 2016, in view of provisions of Section 238 of the Insolvency & Bankruptcy Code, 2016.

From the evidence on record, we will hold that the Corporate Debtor committed default in paying the financial debt when it became due.

This Application is defect free. No disciplinary action appears to be pending against the IRP, whose name is suggested for appointment as IRP. Hence, we admit the Corporate Debtor in CIRP, by following Orders :

O R D E R S

i) The application filed by the Operational Creditor under Section 9 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor, M/s. Sree Kamakhya Tea Co. Pvt. Ltd., is hereby admitted.

ii) Moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016.

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The IRP shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Section 15.

iii) Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:-

a) The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, 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 (54 of 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.

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

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

vi) The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.

vii) Provided that where at any time during the Corporate Insolvency Resolution Process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of the corporate debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

viii) **Mr. Jitendra Lohia, an Insolvency Professional, registered with IBBI, having registration number IBBI/IPA-001/P-00170/2017-2018/10339, E-mail ID :......................................, Mobile No. ....**, is hereby appointed as Interim Resolution Professional by this Tribunal for ascertaining

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the particulars of creditors and convening a meeting of Committee of Creditors for evolving a resolution plan.

ix) The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors and shall identify the prospective Resolution Applicant within 105 days from the insolvency commencement date and follow Regulation 40A strictly.

x) The Operational Creditor is directed to deposit Rs.2,00,000/- (Rupees Two Lacs Only) in the ESCROW Account in SBI to be operated through the Registrar, NCLT, Kolkata Bench, for the purpose of meeting the preliminary expenses for initiating the CIR Process by the IRP within one week of the date of this order.

xi) Registry is hereby directed under section 7 (4) of the I & B Code, 2016 to communicate the order to the Financial Creditor, the Corporate Debtor and to the I.R.P. by Speed Post as well as through E-mail.

xii) List the matter on 30/10/2019 for filing of the progress report.

9. The free copy/certified copy of the Order may be issued to all the concerned Parties, if applied for, upon compliance with all requisite formalities

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Sd/- 21/11/19

(Virendra Kumar Gupta)

Member(Technical)

Sd/- 21/11/2019

(Madan B Gosavi)

Member(Judicial)

Signed on this, the 21st day November, 2019

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