In the National Company Law Tribunal
Kolkata Bench
Kolkata

CP(IB)No. 378/KB/2018

CORAM: Shri M.B. Gosavi, Member (Judicial)

In the matter of:

An application for initiation of Corporate Insolvency Resolution Process 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;

-And-

In the Matter of:

M/s Devi Trading & Holding Private Limited, having its registered office at 8, Camac Street, Shantiniketan Building, 8th Floor, Suit No. 807 Kolkata 700017, West Bengal.

........Financial Creditor

In the Matter of:

M/s Avani Projects & Infrastructure Ltd., a company having its registered office at 59 A, Chowringhee Road Kolkata-700020, West Bengal.

.... Corporate Debtor

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Counsels appeared:

For Financial Creditor:

1. Mr. Arnab Dutta, Advocate
2. Mr. Aritra Basu, Advocate

For Corporate Debtor

1. Mr. Anirudha Mitra, Advocate
2. Sanket Sarawgi, Advocate
3. Dhilon Sengupta, Advocate

Date of pronouncement of order: 13th March, 2019.

ORDER

Per Shri M.B. Gosavi, Member (J):

1. M/s Devi Trading & Holding Pvt. Ltd., the Financial Creditor filed this application under Section 7 of Insolvency and Bankruptcy Code against M/s Avani Projects & Infrastructure Ltd. to start Corporate Insolvency Resolution Process of the Corporate Debtor as the Corporate Debtor committed default in paying financial debt of Rs. 81,12,749/- (Rupees Eighty One Lakh Twelve Thousand Seven Hundred Forty Nine Only).

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2. It is stated that the Financial Creditor gave loan of Rs. 50,00,000/- (Rupees Fifty Lakh Only) to the Corporate Debtor in the year 2013. For repayment of the debt, the Corporate Debtor issued cheques in favour of the Financial Creditor. However, cheques were dishonoured by the Corporate Debtor's Bank on 11.09.2014. In spite of demand of the loan, the Corporate Debtor did not pay the same and committed default. Hence, this application is filed.

3. The Corporate Debtor appeared in this proceeding through one of its directors Mr. Bhaskar Biswas. He filed affidavit-in-reply. The main defence raised is that Hon'ble Calcutta High Court by order dated 14.01.2016, admitted the Petition of winding up of the Corporate Detor filed by one of its other creditors. Hon'ble Calcutta High Court also appointed Provisional Liquidator. The Corporate Debtor is restrained from dealing in any manner with any of its assets. Hence, this application under Section 7 of Insolvency and Bankruptcy Code is not maintainable.

4. I have gone through the record and proceeding of the case. I heard Mr. Arnab Dutta, Ld. Counsel for the Financial Creditor and Mr. Anirudha Mitra, Ld. Counsel for the Corporate Debtor.

5. Ld. Counsel for Financial Creditor submitted that the Corporate Debtor did not dispute the debt and its default. As far as maintainability of of this application is concerned, Ld. Counsel submitted that now in numbers

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of Rulings and Orders, the Hon'ble Apex Court, other Bench of NCLT and NCLAT held that mere admission and pendency of Petition of winding up against the company does not take away the jurisdiction of this Adjudicating Authority to entertain this proceeding under Section 7 of Insolvency & Bankruptcy Code. He relied on order of NCLAT in case of Unigreen Global Private Limited -vs.- Punjab National Bank (Company Appeal No.(AT)(Insolvency) No. 81 of 2017), Order of NCLT (Principle Bench), Delhi in CP No. 190(PB)/2017, Ruling of Apex Court in case of Jaipur Metals & Electricals Employees Organisation -vs.- Jaipur Metals and Electricals Limited (Civil Appeal No. 12023 of 2018). Ld. Counsel for the Corporate Debtor submitted that in this case, Hon'ble High Court has not only admitted the Petition of winding up but also appointed Provisional Liquidator under Section 450 of the Companies Act, 1956. Order of injunction also issued against the Corporate Debtor from restraining them dealing with the assets in any manner. Hence, now this Adjudicating Authority cannot proceed with this application . He relied on order of Bench No. 1 of NCLT, Kolkata Bench dated 10.10.2018 in case of State Bank of India Vs. Jai Balaji Industries Ltd..

6. At the outset, I point out that Order passed by Bench no. 1 of NCLT, Kolkata is now set aside by NCLAT. Hence, this Adjudicating Authority cannot rely on that order. The Apex Court in case of Jaipur Metals & Electricals Employees Organisation -vs.- Jaipur Metals and Electricals Limited (Civil Appeal No. 12023 of 2018), held that, ***"it is clear that***

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Respondent no. 3 has filed a Section 7 application under the Code on 11.01.2018 on which an order has been passed admitting such application by NCLT on 13.04.2018. This proceeding is an independent proceeding which has nothing to do with the transfer of pending winding up proceedings before the High Court. It was open for Respondent no. 3 at any time before a winding up order is passed to apply under Section 7 of the Code. This is clear from reading of Section 7 together with Section 238 of the Code which read as follows:-

> ***"238. Provisions of the Code to override other laws.-***
>
> *The Provisions of this Code shall have effect, notwithstanding Anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."*

7. In case of Forech India Private Limited Vs. Edelweiss Assets Reconstruction Company Ltd. & Ors., Hon'ble NCLAT held that, ***" In the present case, admittedly no order for winding up has been passed against 'Corporate Debtor' by Hon'ble High Court. No liquidation proceeding has been initiated. It appears that some of the applications for 'winding up' under the Companies Act, 1956 are pending, but no order of 'winding up' has been passed. In the circumstances, in the absence of actual initiation of 'winding up' proceedings against the Corporate Debtor, it is always open to Financial Creditor/ Operational***

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Creditor to file an application for Corporate Insolvency Resolution Process against the Corporate Debtor."

8. The same view has expressed by Hon'ble NCLAT in one more case, i.e. Unigreen Global Private Limited -vs.- PNB. It is as follows:-

*" **By aforesaid amendment, the legislature have made it clear that the word "winding up" mentioned in the Companies Act, 2013 is synonymous to the word "liquidation" as mentioned in the I & B Code.***

***In view of the provisions aforesaid, we hold that, if any winding up proceeding has been initiated against the Corporate Debtor by the Hon'ble High Court or Tribunal or liquidation order has been passed, in such case the application under Section 10 is not maintainable. However, mere pendency of a petition for winding up, where no order of winding up or order of liquidation has been passed, cannot be ground to reject the application under Section 10.**"*

9. Even NCLT (Principal Bench), New Delhi in case of Union Bank of India Vs. Era Engineering Ltd. {(IB)-190(PB)/2017}, it has been held that,

" It is in view of the aforesaid binding precedents and the principles of stare decisis that we answer the first question in affirmative. Thus there is no bar on NCLT to trigger the Insolvency

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Resolution Process on an application filed under Sections 7, 9 & 10 if a winding up petition is pending unless an Official Liquidator has been appointed and a winding up order is passed."

10. So it has been consistently held by all Authorities mentioned above that the proceeding under Section 7, 9 or 10 of Insolvency and Bankruptcy Code is maintainable and can be proceeded with irrespective of the fact that winding up petition of the Corporate Debtor is admitted by that High Court. The proceeding under Insolvency and Bankruptcy Code will not be maintainable only if order of winding up of the Company is passed by Hon'ble High Court. In this case, Hon'ble High Court admitted the Petition for winding up of the Corporate Debtor. No doubt Provisional Liquidator is also appointed but final order of winding up has not been passed and Official Liquidator has not been appointed. It is settled law as declared by the Apex Court that the proceeding under I & B Code will not be maintainable only if final order of winding up is passed by the High Court. In view of this, I hold that this application filed by Financial Credior under Section 7 of Insolvency and Bankruptcy Code is maintainable.

11. The Corporate Debtor did not dispute the debt and its default. The Financial Creditor suggested the name of Mr. Ajay Kumar Agarwal for appointment of Interim Resolution Professional. There is nothing on record to show that any disciplinary enquiry is pending against the IRP. This application is defect free. Hence I admit the same by following order:-

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ORDER

i) The application filed by the Financial Creditor under section 7 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor, **M/s Avani Projects & Infrastructure Ltd.** is hereby admitted.

ii) I declare a moratorium and public announcement in accordance with Sections 13 and 15 of the IBC, 2016.

iii) Moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. 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. The public announcement referred to in clause (b) of sub-section (1) of Section 15 of Insolvency & Bankruptcy Code, 2016 shall be made immediately.

iv) 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 judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

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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.

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

vi) 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.

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

viii) Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves

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the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of 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.

ix) Necessary public announcement as per Section 15 of the IBC, 2016 may be made.

x) Mr. Ajay Kumar Agarwal, IP Registration No. IBBI/IPA-002/IP-N0068/2018-2019/11859, residing at Ambey Garden, Block 1, Flat 3C, 3rd Floor, Banglaxmi Abasan, Dashadrone Checkpost, Rajarhat Main Road, Kolkata, West Bengal 700136, E-mail ID: **cs.aaa.2014@gmail.com** is appointed as Resolution Professional for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan.

xi) The Financial Creditor to pay sum of Rs. 50,000/- (Rupees Fifty Thousand Only) to IRP as advance fees as per Regulation 33(2) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation 2016 which shall be adjusted from final bill.

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

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xiii) Registry is hereby directed under section 7(7) 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.

List the matter on **01.05.2019** for the filing of the progress report.

Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

Sd 13/3/2019

(M.B. Gosavi)
Member (Judicial)

Signed on this, the 13th day of March, 2019.

Deeksha(steno)