**IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI**
**PRINCIPAL BENCH**

**C.P. NO. IB-1457(PB)/2019**

**IN THE MATTER OF:**

Sahil Holdings Private Limited .... Financial Creditor/Petitioner

v.

Saluja Construction Co. Limited

.... Corporate Debtor/Respondent

**SECTION: UNDER SECTION 7 OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016**

**JUDGMENT DELIVERED ON 29.08.2019**

**CORAM:**
**CHIEF JUSTICE (RTD.) M.M. KUMAR**
**HON'BLE PRESIDENT**

**SH. S.K. MOHAPATRA**
**HON'BLE MEMBER (TECHNICAL)**

**PRESENT:**

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|---|---|
| For the Petitioner: | Mr. NPS Chawla, Mr. Surekh Baxy, Advocates with Mr. Pranshu, AR |
| For the Respondent: | Mr. Harsh Sethi & Mr. Sarvapriya Makkar, Advocates |

**M.M.KUMAR, PRESIDENT**

**JUDGMENT**

This petition filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') prays for initiation of Corporate Insolvency Resolution Process in respect of 'Corporate Debtor' namely Saluja Construction Company Limited. The petition has been filed on the Form-1 prescribed under Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating

Authority) Rules, 2016 (for brevity 'Adjudicating Authority Rules'). The details of financial debt advanced by the petitioner-Financial Creditor have been set out in Part-IV of the proforma. The total amount disbursed on different dates from 11.02.2013 to 15.04.2015 is claimed to be INR 10,85,00,000/- (Rs. Ten Crore Eighty Five Lacs Only). The said amount was initially provided at the interest rate of 9% per annum for the period of August-November, 2013 which was increased to 12% per annum from December, 2013 and some payment was made on variable rate i.e. 15% per annum.

2. It is the case of the petitioner that in the meantime, the Corporate Debtor repaid the principal amount of Rs. 1,00,00,000/- on 13.04.2015, therefore, the total debt disbursed (principal amount) was Rs. 9,85,00,000/-. Subsequently the Corporate Debtor issued an undated cheque bearing No. 186195 (Annexure I-4) amounting to Rs. 9,85,00,000/- to the Petitioner on 31.07.2015, providing comfort and an assurance of repayment.

3. The Corporate Debtor acknowledged the Financial Debt by providing confirmation of accounts provided in respect of the

Petitioner. It provided interest to the petitioner till April, 2016. However, without assigning any reasons whatsoever, it did not make payment towards interest from May, 2016 to 20.01.2017. In January, 2017, the Respondent issued a cheque amounting to Rs. 10,00,000/- towards part discharge of its payment obligation. However, upon presentation same was also dishonoured due to 'insufficiency of funds'.

4. Feeling aggrieved from the aforesaid act of the Respondent, petitioner issued a legal notice dated 16.04.2019 (Annexure I-10) through its counsel to the Respondent, seeking payment of an amount of Rs. 11,64,14,000/- (Rupees Eleven Crores Sixty Four Lakhs Fourteen Thousand Only). Afterwards the Respondent made part payment of Rs. 75,00,000/- on 06.05.2019 but did not discharge its entire obligation. Ultimately aforesaid cheque amounting to Rs. 9,85,00,000/- which was given by the Respondent to the petitioner to provide comfort and an assurance of repayment, presented by it for encashment which was also dishonoured on 27.05.2019 with a reason of 'Account closed' (Annexure I-13).

5. The amount claimed to be in default and the details of default have been given in sub para 2 of Part-IV and the same reads as under:

| | | |
|---|---|---|
| 2. | AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH DEFAULT OCCURED | The amount claimed to be in default is Rs. 11,08,84,000/- (Rupees Eleven Crore Eight Lacs Eighty Four Thousand only) and the due TDS amount on the outstanding interest which has not been paid to the Financial Creditor.<br><br>The date on which the default occurred is 25.04.2019.<br><br>A true and correct copy of the computation of amount and days in default is annexed herewith and marked as **Annexure I-15.** |

Thus, the case of the petitioner is that on 25.04.2019 a sum of INR 11,08,84,000/- is outstanding and the petition has been filed on 10.06.2019.

6. Learned counsel for the Corporate Debtor has opposed the admission of the petition by asserting as under:-

1. There has been no actual disbursement of any amount for consideration for the time value of money as the

disbursement was in relation to investment in real estate holdings of the Respondent Company.

2. There is a violation to Section 186 (2), 186 (9) & (10) of the Companies Act, 2013 in disbursement of the loan which is not a legally recoverable debt. Section 186 (2) of the Companies Act, 2013 provides that a Company can give loan, guarantee or provide any security or acquisition beyond the limit but subject to prior approval of members by a Special Resolution passed at a General Meeting. Petitioner company further failed in maintaining a Register of loan in Form MBP 2 as provided under Section 186 (9) & (10). In absence of both such requirements, alleged amount cannot be legally recovered.

3. There is further violation to Punjab Registration of Money Lenders Act, 1938 and Punjab Prohibition of Private Money Lending Act, 2007. Petitioner is neither a Non-Banking Financial Company nor a Notified Financial Institution and neither does the petitioner have any valid license under Punjab Registration of

Money Lenders Act, 1937 and/or the Punjab Prohibition of Private Money Lending Act, 2007.

4. The cheque amounting to Rs. 9.85 crores was never executed in its full form by the Respondent as the same was undated and the parties never had any intention to create any security vide the said cheque.

7. We have heard learned counsel for the parties and have also perused the record.

8. Having heard learned counsel for the parties we are of the considered view that the Financial Creditor has succeeded in establishing a case for triggering the Corporate Insolvency Resolution Process.

9. The Financial Creditor has placed on record numerous proof of amount disbursed as loan to the Respondent Company. The material on record and the documents clearly depict that the loan was sanctioned and disbursed. Copies of the aforesaid cheques have been placed on record. Respondent company utilized and enjoyed the loan facility.

10. It is evident that after taking loan subsequently the Corporate Debtor repaid a part of the principal amount of Rs. 1,00,00,000/- on 13.04.2015 and the total outstanding debt was Rs. 9,85,00,000/. Further the Corporate Debtor issued an undated cheque bearing No. 186195 amounting to Rs. 9,85,00,000/- drawn on Axis Bank to the petitioner to discharge is outstanding liability. However, upon presentation the same was dishonoured for the reason of 'Account Closed'. It is also clear that the Corporate Debtor continued to make quarterly payments towards interest till April, 2016 which is reflected in the 'Confirmation of Accounts' of the Corporate Debtor. It goes to show that money given was for time value of money and the petitioner comes within the definition of Financial Creditor. It also has commercial effect of borrowing as defined in clause f of Section 5(8) of the Code, 2016. The Corporate Debtor has also duly deducted TDS on the interest paid to the petitioner which is further reflected in Form 26AS.

11. A legal notice dated 16.04.2019 was issued by the petitioner making demand for defaulted financial debt of Rs. 11,64,14,000/- and thereafter the Respondent released a part-

payment of Rs. 75,00,000/- towards the existing liability. The Respondent has not disputed the disbursement of money at any point of time.

12. There is no room for argument advanced on behalf of the Corporate Debtor that the provisions of Section 186 of the Companies Act, 2013 has been violated while disbursing the loan because the financial debt was initially disbursed in 2013 when the such provisions were not applicable and the petitioner was exempted as a 'Private Company' under Section 372A of the Companies Act, 1956. Further after March, 2014 the financial debt disbursed never exceeded the prescribed threshold limits as provided under Section 186(2) of the Companies Act, 2013 to warrant passing of a special resolution.

13. The other argument concerning applicability of Punjab Registration of Money Lenders Act, 1938 and Punjab Prohibition of Private Money Lending Act, 2007 has also failed to impress us because the entire cause of action arose to the petitioner in Delhi including the fact that registered offices of both the entities are situated at Delhi and the said act would only apply to the territory of Punjab and Haryana.

14. Moreover, the provisions of Section 238 of the Code contain a widest non-obstante clause which would exclude the application of any other law. In that regard we may place reliance on the observations of Hon'ble the Supreme Court in the para 55 of the judgment rendered in the case of ***M/s Innoventive Industries Limited v. ICICI Bank & Anr.***, (2017) 205 Comp Cas 57 (S.C.). The pertinent observations of Hon'ble the Supreme Court reads as under:

> "Further, the non-obstante clause contained in Section 4 of the Maharashtra Act cannot possibly be held to apply to the Central enactment, inasmuch as a matter of constitutional law, the later Central enactment being repugnant to the earlier State enactment by virtue of Article 254 (1), would operate to render the Maharashtra Act void vis-à-vis action taken under the later Central enactment. Also, Section 238 of the Code reads as under:
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> > "238. ***Provisions of this 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."

It is clear that the later non-obstante clause of the Parliamentary enactment will also prevail over the limited non-obstante clause contained in Section 4 of the Maharashtra Act. For these reasons, we are of the view that the Maharashtra Act cannot stand in the way of the corporate insolvency resolution process under the Code."

Rejecting the argument that Maharashtra Act kept the debt in temporary abeyance for one year, Hon'ble the Supreme Court went on to observe

"The notification under the Maharashtra Act continues for one year at a time and can go upto 15 years. Given the fact that the timeframe within which the company is either to be put back on its feet or is to go into liquidation is only 6 months, it is obvious that the period of one year or more of suspension of liability would completely unsettle the scheme of the Code and the object with which it was enacted, namely, to bring defaulter companies back to the commercial fold or otherwise face liquidation. If the moratorium imposed by the Maharashtra Act were to continue from one year upto 15 years, the whole scheme and object of the Code would be set at naught. Undeterred by this, Dr. Singhvi, however, argued that since the suspension of the debt took place

from July, 2015 onwards, the appellant had a vested right which could not be interfered with by the Code. It is precisely for this reason that the non-obstante clause, in the widest terms possible, is contained in Section 238 of the Code, so that any right of the corporate debtor under any other law cannot come in the way of the Code." (emphasis added)

The legal position has been put beyond doubt that Section 238 of the Code contains a non-obstante clause which is in the 'widest terms possible'. Therefore, the argument raised on behalf of Corporate Debtor is not sustainable and we have no hesitation to reject the same.

15. We further find that all requirements of Section 7 for the initiation of Corporate Insolvency Resolution Process by a Financial Creditor stand fulfilled. In that regard, it has been submitted that the petition as prescribed by Rule 4 (1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Section 7 (2) of IBC is complete in all respects. He has further submitted that the details of the default along with the dates have been stated in part IV and the additional documents have been submitted subsequently along

with all the minute details. There is overwhelming evidence available to prove default and name of the resolution professional has been specified who does not suffer from any disqualification.

16. We may now examine the provisions of Section 7 (2) and Section 7 (5) of IBC which read as under:-

**"Initiation of corporate insolvency resolution process by financial creditor.**

7 (1) .....

7 (2) The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.

7 (3) .....

7 (4) .....

7 (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; or

(b) ....."

17. A conjoint reading of the aforesaid provision would show that form and manner of the application has to be the one as prescribed. It is evident from the record that the application has been filed on the proforma prescribed under Rule 4 (2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Section 7 of the Code. We are satisfied that a default amounting to lacs of rupees has occurred. As per requirement of Section 4 of the Code if default amount is one lac or more then the CIR Process would be issued. The application under sub section 2 of Section 7 is complete; and no disciplinary proceedings are pending against the proposed Interim Resolution Professional.

18. The Financial Creditor has proposed the name of Resolution Professional, Mr. Sanyam Goel with the address 938, Basement Office, Sector-40, Gurugram, Haryana-122002 and email id –

goelsanyam@gmail.com. His registration number is IBBI/IPA-002/IP-N00138/2017-18/10397. He has filed his writtencommunication which satisfies the requirement of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 along with the certificate of registration.

19. As a sequel to the above discussion, this petition is admitted and Mr. Sanyam Goel is appointed as an Interim Resolution Professional.

20. In pursuance of Section 13 (2) of the Code, we direct that Interim Insolvency Resolution Professional to make public announcement immediately with regard to admission of this application under Section 7 of the Code. 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.

21. We also declare moratorium in terms of Section 14 of the Code. A necessary consequence of the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) and thus the

following prohibitions are imposed which must be followed by all and sundry:

"(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 Securitisation 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."

22. It is made clear that the provisions of moratorium shall not apply to (a) such transactions which might be notified by the Central Government in consultation with any financial regulator; (b) a surety in a contract of guarantor to a Corporate Debtor. Additionally, the supply of essential goods or services to the Corporate Debtor as may be specified is not to be terminated or suspended or interrupted during the moratorium period. These would include supply of water, electricity and similar other services or supplies as provided by Regulation 32 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

23. The Interim Resolution Professional shall perform all his functions religiously and strictly which are contemplated, *interalia*, by Sections 15, 17, 18, 19, 20 & 21 of the Code. He must follow best practices and principles of fairness which are to apply at various stages of Corporate Insolvency Resolution Process. His conduct should be above board & independent; and he should work with utmost integrity and honesty. It is further made clear that all the personnel connected with the Corporate Debtor, erstwhile directors, promoters or any other person

associated with the Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional as may be required by him in managing the affairs of the Corporate Debtor. In case there is any violation committed by the ex-management or any tainted/illegal transaction by ex-directors or anyone else the Interim Resolution Professional/Resolution Professional would be at liberty to make appropriate application to this Tribunal with a prayer for passing an appropriate order. The Interim Resolution Professional/Resolution Professional shall be under a duty to protect and preserve the value of the property of the 'Corporate Debtor' as a part of its obligation imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code.

24. Directions are also issued to the Ex-Management/Auditors etc. to provide all the documents in their possession and furnish every information in their knowledge as required under Section 19 of the Code to the Interim Resolution Professional within a period of one week from today otherwise coercive steps to follow.

25. We direct the Financial Creditor to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional to meet out the expenses to perform the functions assigned to him in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within three days from the date of receipt of this order by the Financial Creditor. The amount however be subject to adjustment by the Committee of Creditors. The amount must be accounted for by Interim Resolution Professional and shall be paid back to the Financial Creditor.

26. Before parting we must notice the complaint made against Financial Creditor in the form of discrepancies in the statement of account. We cannot in summary proceedings determine the amount due. This function is required to be performed by the Information Utility which is not yet fully functional. Therefore, Resolution Professional may ask the ex-promoter/director of the Corporate Debtor for any such correction if need be and act accordingly by placing it before the Financial Creditor as it is only fair to do so.

27. The office is directed to communicate a copy of the order to the Financial Creditor, the Corporate Debtor, the Interim Resolution Professional and the Registrar of Companies, NCR, New Delhi at the earliest but not later than seven days from today. The Registrar of Companies shall update its website by updating the status of 'Corporate Debtor' and specific mention regarding admission of this petition must be notified.

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**(M.M. KUMAR)**
**PRESIDENT**

**S.K. MOHAPATRA**
**MEMBER (TECHNICAL)**

**29.08.2019**
**VINEET**