

2. It is submitted by the counsel for the Financial Creditor that loan facilities were advance to the Corporate Debtor on 28.03.2018 in two transactions one amounting to Rs. 49,50,62,885/- another amounting to Rs. 49,37,115/- the total term loan is Rs. 50 Crores. The date of default is on 15.02.2020. It is submitted that the Corporate Debtor started to pay EMI w.e.f., 28.03.2018 and up to November, 2019 the account was regular but thereafter the CD did not pay the EMI, as was agreed. A notice under Section 13(2) of the SARFAESI Act, was given on 18.02.2020. However, in spite of notice there was no response from the Corporate Debtor.
3. On 28.03.2018 the loan agreement was entered into between the Financial Creditor and Corporate Debtor and the detail of the terms and conditions were stated therein and the schedules of payment were also annexed with the same. Under Para 2.2 of the agreement, it is stated that the borrowers shall pay to the lenders interest on the principal amount of the loan outstanding from time-to-time on monthly basis i.e., 15th of each month at the rate set out in Schedule -IV hereto. The agreement is providing Amortization Schedule by which dates are fixed for the payments to be made by the Corporate Debtor to the Financial Creditor.
4. The Corporate Debtor failed to adhere to the schedules attached to the loan agreement. The events of default and remedies are provided in the agreement which provide that if one or more of the events specified therein happen, the lenders will give notice in writing to the borrower to pay the principal sum and all accrued interest on the loan given and payable forthwith. The security, in terms of Article III of the Loan Agreement shall become enforceable. It is further provided that if delay occurs in the

Contd

CP-IB-581/ND/20

payment of principal sum or any installment of interest on loans and continued for a period of 30 days, the same will constitute as default. In short, the recitals of the agreement mentioned above provide that in the event of default, the Financial Creditor is at full liberty to resort to the remedies available under law.

5. This authority also perused the notice that was issued on 18.02.2020 by the Financial Creditor to the Corporate Debtor. The notice provides that as per the terms of the loan agreement and related documents entered into between the Financial Creditor and the Corporate Debtor, it is required to repay the principal of the loan and interest thereon in accordance with the repayment schedule. It reveals from the notice that the Financial Creditor has also sent emails and made telephone calls to the CD to fulfill its commitments in relation to the payments of the loan advanced as per the schedules. The notice indicates that an amount of Rs. 50,78,74,188/- is in default.
6. It is also noted that the terms and conditions of the loan agreement provide consequence of the default, which go to state that on happening of any of the events of default, in addition to the right specified in Section 10.1, the lenders shall be entitled to charge additional penal interest @ 1% p.a. or at the prevailing rate as per the extant policy of the Financial Creditor over and above the rates specified in Schedule IV of the loan agreement or such other rate as may be specified by the Financial Creditor from time to time from the retrospective dates of such default, if the default is not remedied, without prejudice to the Financial Creditor's other rights available as per the agreement.

Contd.

CP-IB-581/ND/2020

7. Besides the loan agreement, an agreement for Pledge of Shares was executed on 13.04.2018. Further, an undertaking given by the Corporate Debtor on 28.03.2020 provides that the Corporate Debtor has undertaken not to transfer, assign, dispose of, pledge, charge or create any lien or in any way encumber existing shareholdings or future shareholdings in the Corporate Debtor in favour of any person or company, save and except pledge already created/to be created in favour of the Financial Creditor, so long as any money remains due by the Corporate Debtor to the Financial Creditor under the loan agreement entered into between them. There is another document i.e., declarations and undertakings dated 10.05.2018 which contains the recitals with regard to the Mortgage. The charges have also been created under the provisions of the Companies Act, on the assets and shares of the Corporate Debtor, as reflects from the documents placed at Page 54 of the type set filed with the petition.
8. The Corporate Debtor has filed the *reply*. Under Para 3(ii) of reply, it is stated that there is not default on the part of the Corporate Debtor, as the loan is being paid along with interest on time. However, on perusal of the ledger Account up to 15.02.2020 maintained by FC, it reveals that the amount due on account of the principal and interest has not been paid. Only insignificant portion of the amount has been paid, the default is clear on the part of the Corporate Debtor in terms of the loan agreement. Therefore, the argument of the counsel for the Corporate Debtor is rejected. The other issues raised are as follows; - (i) the petition is not signed by the authorized person (ii) the Applicant is not a Financial Creditor, and (iii) this Authority has no jurisdiction, as the parties agreed to invoke the jurisdiction of DRT only.

Contd -

CP-IB-581/ND/20

9. It is submitted by the counsel for the Respondent that authority provided to the signatory to the petition was given by the Board of Directors of the FC in 2004 and the Insolvency Bankruptcy Code, 2016 has come into force in 2016 and no resolution was passed or any authority is granted by the Board of Directors of the Financial Creditor in favour of Sh. N Ramachandran Authorizing him to file petition/application for initiation of CIR Process against the Corporate Debtor. The counsel for the Respondent has supported his arguments with the order dated 06.05.2020 passed by NCLT Mumbai in CP No. IB-2161/MB/C-IV/2019 wherein under para 10, it is observed that the Board of Financial Creditor has given the authority to represent the company in relation to property, not for filing the petition under IBC.
10. In connection with the above, this authority has perused the Board Resolution of FC dated, 17.05.2004. The operative part is reproduced as follows; -
- “Resolved That power of attorney, as per draft placed on the table and initiated by the Chairman of the meeting for the purpose of identification be granted in favour of Sh. N. Ramachandran, Manager (Law) for the present of the Corporation to sign and execute legal documents on behalf of TFCI, TFCI acting for itself and also acting as Attorney of other institutions, including for creation of mortgage by accepting deposit of title deeds, ceding part-passu charge(s), signing debenture trust deeds and other documents required to be executed in connection with the grant of financial assistance to the assisted concerns/borrowers and also in connection with the smooth operations of the activities of TFCI for financing and/or development*

Contd -

CP-IB-581/ND/20

of tourism and tourism related activities: II. To file suits/claims or initiating legal proceedings against the defaulting assisted concerns and/or guarantors of the loan/s and/or against any such person/persons, body corporate firm as may be directly or indirectly interested therein, for recovery of dues of the Company and/or otherwise, if necessary under the law, in appropriate court/s or tribunal or notified authority under law and/or intervene or defend in any suit or legal/other proceedings by or against an assisted concern, guarantor/s of the loans/facilities and/or any other interest party, and in connection therewith to appoint advocates/attorneys/agents and to sign and/or affirm ad/or file on behalf of the Company all the petitions, applications, complaints, written statements or other statements, affidavits, vakalatnamas and all other paper/documents and to do all such other acts, deeds and things in relation thereto as may, no legal advice be necessary".(emphasis supplied)

The recitals mentioned above, clearly provide the authority to the signatory for filing this petition, therefore, point raised by the counsel for the Corporate Debtor is misleading and is rejected.

- 11. It is further submitted by the counsel for the Corporate Debtor that loan was to be paid in 48 installments up to 15.01.2031 and the loan agreement is dated, 28.03.2018. Therefore, recall of entire loan on 15.02.2020 by the FC is not correct. But the loan agreement clearly provides that if there will be breach of the EMI and the payment of the interest, then the Financial Creditor has the authority to recall the total loan. Therefore, this argument of

Contd -

the counsel for the Corporate Debtor is contrary to the terms and condition incorporated in the loan agreement and is rejected.

12. The counsel for the Corporate Debtor has referred to Para 2.6 of the loan agreement which provides that if the Corporate Debtor commits a default in payment or repayment of three consecutive installments of principal amounts of the loan or interest thereon or any combination thereof. The Financial Creditor shall have the right to convert at its option the whole of the outstanding amount of the loan or a part not exceeding 20% of the loan, whichever is lower, into fully paid-up equity shares of the borrower, at par, in the manner specified in a notice of not less than 30 days in writing to be given by the Financial Creditor to the borrower prior to the date on which the conversion is to take effect, which date shall be specified in the said notice of conversion. It is submitted by the counsel for the Corporate Debtor that under the agreement the option is available in the event of default of payment of the principal and interest. Therefore, the petition filed under Section 7 of the IBC is not maintainable in the light of the option to be exercised by the Financial Creditor in the event of default. The arguments of the counsel of the CD are self-contradictory. On one hand the counsel for CD pleads that there is no default, on the other he talks of exercising of the option by the FC with regard to the default committed by CD. Moreover, the FC can very well avail the remedy under IBC. Therefore, on this count the arguments of the Counsel for the CD are rejected.

13. The counsel for the Corporate Debtor vehemently argued that the Applicant cannot be a Financial Creditor for the reasons that for few defaults he is initiating CIR Process against the Corporate Debtor and has not

Contd.

CP-IB-581/ND/20

considered to restructure the loan looking to the viability of the Corporate Debtor. It is argued that the Financial Creditor has to see the interest of the entity/Corporate Debtor that its business may go on, instead of filing petition under Section 7 for initiating the CIR Process for pushing the CD into liquidation.

14. In rebuttal to the arguments of the counsel for CD, the counsel for the Financial Creditor submitted that the loan transactions have all the elements of the Financial debt, as the amount has been disbursed to the CD against the consideration for time value of money. It is further submitted by the counsel for the FC that efforts have been made to send the notice, letters, telegrams to the Corporate Debtor for making the payment of the EMIs and the interest, which they failed to pay as per the schedules attached to the loan agreement. The submissions made by the counsel for the FC are plausible, there is no force in the arguments of the counsel for the CD.
15. The counsel for the Corporate Debtor has raised an issue of jurisdiction of this authority. He has referred to Para 2.8 of the loan agreement, which provides that legal action for any dispute arising out of this agreement and all related documents may be submitted to jurisdiction of Debts Recovery Tribunal at Delhi/High Court for Delhi, at Delhi. However, ongoing through the recitals, there does not appear that parties to the loan agreement had the intention to oust the jurisdiction of this Authority under the IBC, 2016. In this regard we refer to the provisions of Section 238 of IBC, which provides that the provisions of IBC shall override other laws including instrument having effect by virtue of any such law. Therefore, the arguments of the counsel for the Corporate Debtor stand rejected.

Contd -

CP-IB-581/ND/20

16. The documentary evidence placed on record is sufficient in its nature to ascertain the default on the part of the Corporate Debtor. The Financial Creditor has also proposed the name of the Interim Resolution Professional namely, *Mr. Shashi Kant Nemani, Chartered Accountant, Company Secretary, having Registration No. IBBI/IPA-001/IP-P00078/2017-18/10163, Address 1517, Devika Towers, 6, Nehru Place, New Delhi-110019* and the email address: nemani61@gmail.com and mobile numbers: 9811026144; 8700734028 is also available in Form-2, placed on record. It is noted in the Form that no investigation is pending against him.
17. By keeping in view, the facts and circumstances of the case stated above, the Application is **Admitted** and the CIR Process is initiated against the Corporate Debtor w.e.f. the date of this Order. The Applicant has proposed the name of the Interim Resolution Professional therefore, we appoint *Mr. Shashi Kant Nemani*, as IRP in the matter, who is directed to make the public announcement within three days from the date of receipt of the copy of this Order and make compliances with other provisions of the code to make progress in the CIR Process, as prescribed.
18. The IRP is directed to take control of the assets and bank accounts of the Corporate Debtor expeditiously and the notice shall be sent to the Managers of the Banks where the accounts of the Corporate Debtor are being operated for information that CIR Process is initiated against the Corporate Debtor and no withdrawal shall be allowed through the authorized signatory of the Corporate Debtor. The IRP shall be entitled to operate Bank accounts of the Corporate Debtor.

Contd-

CP-IB-581/ND/20

19. The CIR Process shall be completed within a period of one hundred and eighty days from the date of admission of the application. The IRP/RP could file an application before this Authority to extend the period of the CIRP beyond one hundred and eighty days, if instructed to do so by the committee of creditors through a resolution passed with sixty-six per cent of the voting share.

20. The Moratorium is declared which shall have effect from the date of this Order till the Completion of CIRP, for the matters referred in Section 14 of the IBC, 2016. It is ordered to prohibit all the following namely:

(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 off 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 (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.

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 Sub-Section (1) of Section 14 shall not apply to such transactions, as notified by the Central Government.

21. The IRP shall comply with the provisions of Section 13 (2), 15, 17 & 18 of IBC, 2016. The personnel of the corporate debtor, its promoters or any other person associated with the management of the corporate debtor are directed to extend all assistance and cooperation to the IRP as may be required by him in managing

Contd -

CP-IB-581/NO/20

the affairs of the corporate debtor as stipulated under Section 19. So that he could discharge his functions under Section 20 of IBC, 2016.

22. The Financial Creditor is directed to send the copy of this Order to IRP, so that he could take charge of the Corporate Debtor's assets etc., and make compliance with this Order as per the provisions of the Code. The FC is also directed to communicate this Order to the Corporate Debtor with immediate effect.

23. The order is dictated and pronounced in the court held through video conferencing, in the presence of the Sr. counsels for the parties. Consequently, the IA-4701/ND/2020 filed in **C.P IB-581/ND/2020** stand **dismissed.**

(NA *- Sd.*)
MEMBER (TECHNICAL)

- Sd.
(CH. MOHD. SHARIEF TARIQ)
MEMBER (JUDICIAL)

Court - III

17.12.2020

IA-4701/ND/20 in CP-IB-581/ND/20