

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH, KOLKATA

C.P. (IB) No. 1376/KB/2018

Coram: 1. Shri Madan B. Gosavi, Hon'ble Member (Judicial)
2. Shri Virendra Kumar Gupta, Hon'ble Member (Technical)

In the matter of:

An application to initiate 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:

Dewesh Auto Creative Services Private Limited (CIN: U65910WB1997PTC083886),
having its registered office at 21/3, S. N. Chatterjee Road, Kolkata-700038;

... .. **Financial Creditor / Applicant**

- Versus -

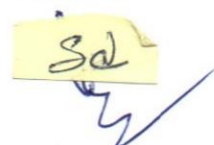
A.K. Power Industries Private Limited (CIN: U40104WB2008PTC130530), having its
registered office at Shrutineer 23/2/1/1, Bhagwan Chatterjee Lane, Howrah-
711101

... .. **Corporate Debtor / Respondent**

Counsel on Record:

- | | | |
|------------------------------------|--|----------------------------|
| 1. Mr. Arnab Dutta, Advocate | | ... For Financial Creditor |
| 2. Mr. Sourojit Dasgupta, Advocate | | |
| 3. Mr. D. Agarwal | | |
| 1. Mr. Joydip Banerjee, Advocate | | |
| 2. Mr. Suman Saha, Advocate | | ... For Corporate Debtor |





3. Mr. Joy Das, Advocate |
4. Ms. Urmi Roy Chowdhury |

Date of Hearing: 26.09.2019

Date of Pronouncement of Order: 01. 10. 2019

ORDER

Per Virendra Kumar Gupta, Member (T)

1. This petition under Section 7 of Insolvency and Bankruptcy Code, 2016 (in short "IBC, 2016") has been filed by Financial Creditor, Dewesh Auto Creative Services Private Limited, for initiation of Corporate Insolvency Resolution Process (in short "CIRP") against the Corporate Debtor, A.K. Power Industries Private Limited as the Corporate Debtor has committed default in repayment of financial debt. The amount of default has been claimed as Rs.58,09,635.81 (Rupees Fifty Eight Lakhs Nine Thousand Six Hundred Thirty Five and Eighty One Paise only) and interest thereon. The date of default has been claimed to have occurred on different dates.

2. The facts, in brief, are that a working capital loan agreement dated 19th December, 2014 was executed between the parties whereby a sum of Rs. 1,00,00,000/- (Rupees One Crore only) had been given to the Corporate Debtor for a period of 24 months. Interest rate was fixed at 36% per annum compounded on monthly basis. The Corporate Debtor repaid a sum of Rs. 85,00,000/- (Rupees Eighty Five Lakhs only) on different dates between the period 2nd June, 2015 and 26th September, 2016. The balance amount remained unpaid which the Financial Creditor required from the Corporate Debtor to pay. Legal notice was given on 12th September, 2018. However, the amount was not settled and paid, hence, this petition.

CP (IB) No. 1376/KB/2018
Dewesh Auto Creative Services Pvt. Ltd.
-vs-
A.K. Power Industries Pvt. Ltd.

Sd

Sd

3. Mr. Joy Das, Advocate |
4. Ms. Urmi Roy Chowdhury |

Date of Hearing: 26.09.2019

Date of Pronouncement of Order: 30.09.2019

ORDER

Per Virendra Kumar Gupta, Member (T)

1. This petition under Section 7 of Insolvency and Bankruptcy Code, 2016 (in short "IBC, 2016") has been filed by Financial Creditor, Dewesh Auto Creative Services Private Limited, for initiation of Corporate Insolvency Resolution Process (in short "CIRP") against the Corporate Debtor, A.K. Power Industries Private Limited as the Corporate Debtor has committed default in repayment of financial debt. The amount of default has been claimed as Rs.58,09,635.81 (Rupees Fifty Eight Lakhs Nine Thousand Six Hundred Thirty Five and Eighty One Paise only) and interest thereon. The date of default has been claimed to have occurred on different dates.

2. The facts, in brief, are that a working capital loan agreement dated 19th December, 2014 was executed between the parties whereby a sum of Rs. 1,00,00,000/- (Rupees One Crore only) had been given to the Corporate Debtor for a period of 24 months. Interest rate was fixed at 36% per annum compounded on monthly basis. The Corporate Debtor repaid a sum of Rs. 85,00,000/- (Rupees Eighty Five Lakhs only) on different dates between the period 2nd June, 2015 and 26th September, 2016. The balance amount remained unpaid which the Financial Creditor required from the Corporate Debtor to pay. Legal notice was given on 12th September, 2018. However, the amount was not settled and paid, hence, this petition.

Sd

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3. The Ld. Counsel appearing on behalf of the Financial Creditor narrated the abovesaid facts and drew our attention to clauses no. 3, 5 & 7 of the agreement to show the various terms and conditions agreed by and between the parties. He submitted that the debt was payable on 21st December, 2016 and, therefore, this petition was filed within three years, hence, was in compliance to the provisions of section 238A of the IBC, 2016. He further submitted that the petition filed under Section 7 was complete in all respects. The Ld. Counsel also submitted that the name of Mr. Arun Kumar Khandelia as Interim Resolution Professional (“IRP”), who is qualified to act as IRP as per applicable regulations and he had given his consent to act as such, has been proposed. He further submitted that no disciplinary proceedings were pending against Mr. Arun Kumar Khandelia.

4. The Ld. Counsel for the Corporate Debtor initiated his proceedings by emphatically arguing that subject loan agreement was a forged one and could be sent for forensic examination as per rule 43 of NCLT Rules, 2016. As regards the genuineness of the agreement, he submitted that one Archana Mallick had signed the agreement, whereas the agreement had been executed by and on behalf of the Corporate Debtor by Mr Ayan Mallick. He made his second plea that the entire amount had been paid, hence, no debt remains due and payable. For this proposition, he took us to pages no. 7 & 9 showing the transactions of receipt and repayment of money.

5. In the rejoinder, the Ld. Counsel for the Financial Creditor pointed out that Archana Mallick had signed as witness and this did not have any relevance to the validity of the agreement or genuineness thereof.

6. We have considered the submissions made by both the sides and also perused the material on record.

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7. As far as disbursement of the amount is concerned, the same is not in dispute. It is also noted from the statement attached to the reply affidavit filed by the Corporate Debtor that before this loan transaction, a sum of Rs. 70,00,000/- (Rupees Seventy Lakhs only) had also been borrowed on 15.11.2014 which was repaid on 17.12.2014. Thereafter, Rs. 1,00,00,000/- (Rupees One Crore only) had been received by the Corporate Debtor on 22.12.2014. It is noted that a sum of Rs. 85,00,000/- (Rupees Eighty Five Lakhs only) has been repaid through cheques on different dates, whereas balance amount claimed to have been paid is through cash entries starting from 1/3/2016 till 11/11/2016. However, no receipt / acknowledgement of the same by the Financial Creditor have been brought to record. Thus, without any cogent material / evidence being brought on record, no credibility can be attached to such claim of the Corporate Debtor.

8. As far as the genuineness of the loan agreement is concerned, we do not find any merit in the said contentions of the Corporate Debtor for the reason that even before this loan agreement, also money had been taken and repaid by the Corporate Debtor from the Financial Creditor. Further, for the purposes of IBC, 2016, the fact of obtaining loan is sufficient to create an obligation to repay the same which is a claim of the Financial Creditor to receive the payment. Further, the obligation to repay the loan arises from the promise to pay which is implied in law and is also based upon ethical principle of business. Thus, for these reasons, we are of the view that this contention of the Corporate Debtor is devoid of any merit.

9. In view of the above facts and legal position, we hold that this petition is liable to be admitted which is otherwise complete in all respects. The name of the IRP has also been proposed which we approve. We admit this petition and order as under:

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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, **A.K. Power Industries Private Limited**, is hereby admitted.
- ii) We declare a moratorium and cause 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;
 - b) Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

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- 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 be specified 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 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. ARUN KUMAR KHANDELIA, IRP Registration No. IBBI/IPA-002/IP-N00514/2017-18/11592, E-mail: arun@cskarun.com, having office K. Arun & Co., 8, Camac Street, 8th Floor, Suite 807, Kolkata-700 017, is appointed as Interim 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. 2,00,000/- (Rupees Two Lakhs Only) to IRP as advance fees as per Regulation 33(3) 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.
- Xiii) List the matter on 1/11/2019 for filing of the progress report.
- xiv) 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.
- xv) Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

Sd
(Madan B. Gosavi)
Member (Judicial)
1/11/2019

Sd
(Virendra Kumar Gupta)
Member (Technical)
1/11/2019

Signed on this, the 01st day of October, 2019.

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