

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT V**

CP No. 590/(IB)-MB-V/2023

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

In the matter of

M/s. Odyssey Corporation Ltd. & Anr.

102, Haridarshan Building, Bhogilal Phadia Road,
Kandivali West, Mumbai- 400067.

... Petitioner/Financial Creditor

V/s

Diaonics Automation (India) Private Limited

Office No. 4/5 Nalawade Chambers, opp.
Muktidham Nashik Road, Nashik, Maharashtra-
422101.

... Respondent/Corporate Debtor

Order Dated: 19.12.2023

Coram:

Hon'ble Reeta Kohli, Member (Judicial)

Hon'ble Madhu Sinha, Member (Technical)

Appearances: Physical

For the Petitioner: Adv. Ambrin Khan

For the Corporate Debtor: Adv. Saiee N

ORDER

Per: Madhu Sinha, Member (Technical)

1. The Petitioners viz. **'M/s. Odyssey Corporation Ltd. and Pooja Himanshu Mehta' (hereinafter as Petitioner)** has furnished Form No. 1 under Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter as Rules) in the capacity of **"Financial Creditor"** by invoking the provisions of Section 7 of the Insolvency and Bankruptcy Code (hereinafter as Code) against **M/s. Diaonics Automation (India) Private Limited'** (hereinafter as **'Corporate Debtor**). This Petition is filed under Section 7 of Insolvency and Bankruptcy Code, 2016 (hereafter called the **'Code'**) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 on 14th July, 2023 for a Resolution of an unresolved Financial Debt of Rs.7,98,77,141/- inclusive of contractual interest, penal interest, costs and expenses.

2. List of documents attached to this Petition in order to prove the existence of Financial Debt, the amount and date of default are as follows:
 - a. A copy of Loan Agreement dated 23.12.2016.
 - b. A copy of Deed of Confirmation dated 31.01.2017 from the Corporate Debtor to the Financial Creditor.
 - c. A copy of Memorandum of Understanding dated 05.07.2017.
 - d. A copy of Advocate's Notice dated 22.09.2018 sent by Financial Creditor to the Corporate Debtor.
 - e. A copy of Deed of Simple Mortgage executed by the Corporate Debtor in the favour of the Financial Creditors dated 02.10.2018.
 - f. A copy of letter of Confirmation issued by Corporate Debtor to Financial Creditor dated 16.01.2021.
 - g. A copy of Bank statement of the Financial Creditors.
 - h. Date of Default as per part IV of the application is 16.01.2022.

Brief Facts

3. The Petition reveals that the Financial Creditor No. 1 is a Public Limited Company incorporated under the provisions of the Companies Act, 1956 and is inter alia engaged in the business auxiliary to financial intermediation, except insurance and pension funding and enjoys immense goodwill in the market. The Financial Creditor No. 2 is a Promoter of the Financial Creditor No. 1. The Corporate Debtor is a Private Limited Company incorporated under the provisions of the Companies Act, 1956, inter alia engaged in the business of designing, producing and market automation products viz. wireless fire detection systems, surveillance radar system and energy efficient lighting etc.

4. It is submitted that in December 2016, the Corporate Debtor approached the Financial Creditor No. 1 and represented that the Government of Maharashtra vide purchase order number KA/DMUVV/TERNDER/5038/2016 dated 25.11.2016 had awarded a contract for installation of frequency based wireless Addressable Fire Detection System Integrated Vice Evacuation Control panel for Vidhan Sabha, to Keonics (Karnataka State Electronics Development Corporation Ltd.). Keonics had subcontracted the same to the Corporate Debtor vide Technology Partnership Agreement dated 03.09.2016. In order to execute the said project, the Corporate Debtor sought for financial assistance of Rs.2,00,00,000/-from the Financial Creditor 1. Based on the representation made by the Corporate Debtor, the Financial Creditor agreed to advance the same. Accordingly, Loan Agreement dated 29.12.2016 was executed between the Financial Creditor 1 and Corporate Debtor.

5. The Financial Creditors advanced a sum of Rs. 2,00,00,000/- (Rs. 1,00,00,000/- each) to the Corporate Debtor in following four tranches:
 - i) Rs. 50,00,000/- on 30.12.2016
 - ii) Rs. 50,00,000/- on 30.12.2016
 - iii) Rs. 60,00,000/- on 05.01.2017

iv) Rs. 40,00,000/- on 05.01.2017

The said loan was repayable within a period of six-month i.e. 28.06.2017 along with interest at the rate of 2.5% per month i.e. 30% p.a.

6. It is further submitted that upon receipt of the said loan, the Corporate Debtor executed Deed of Loan Confirmation dated 31.01.2017 confirming and acknowledging the receipt of the said sum of Rs. 2,00,00,000/-. Under the said Loan Confirmation Deed, the Corporate Debtor undertook and assured to repay the entire outstanding loan along with accrued interest thereon within a period of six months of the execution, failing which the Financial Creditor shall be entitled to purchase a Flat No. 1105, A Wing, 11th Floor, Poseidon Tower, village Versova, Andheri West Mumbai owned by the Directors of the Corporate Debtor by paying the remaining sale amount (Hereinafter referred to as "the said Property").
7. After availing the loan, the Corporate Debtor continued to service the loan by making the payment towards interest.
8. It is further submitted that the Corporate Debtor failed to repay the entire loan along with accrued interest thereon within a period of six months, due to the non-payment of said loan on time, the Corporate Debtor and the Financial Creditors entered into a Memorandum of Understanding (MOU) dated 05.07.2017. As per the said MOU, the Financial Creditor shall be entitled to immovable property mentioned therein in case the Corporate Debtor failed to repay the outstanding loan along with the accrued interest thereon within the period of six months from the date of the MOU.
9. Despite several follow ups, the Corporate Debtor failed to pay the outstanding loan along with accrued interest thereon. Despite the extension the Corporate Debtor failed to repay the loan. Further the loan was extended from time to time at the request of the Corporate Debtor and in the meantime the Corporate Debtor continued to service the loan and

made the last interest payment of Rs. 5,00,000/- on 02.06.2018. Pursuant thereto, they neither serviced the interest payments nor repaid the loan amount.

10. It is further submitted that towards the repayment of the outstanding loan, the Corporate Debtor had issued post-dated cheques, however, the said post-dated cheques when deposited were returned dishonoured with remark "Funds Insufficient." Subsequently, the Financial Creditors through its Advocate issued a statutory notice under Section 138 of Negotiable Instrument Act to the Corporate Debtor calling upon the them to pay the amount of the dishonoured cheque within a period of 15 days.
11. The Corporate Debtor replied to the above statutory notice vide its Letter dated 05.09.2018 thereby regretting the dishonour of the cheque and further expressed their willingness to execute the mortgage deed in the favour of the Financial Creditor and further sought for an accommodation.
12. Subsequent to above, since the Corporate Debtor once again failed to keep up with its assurance, the Financial Creditor vide its Advocate's Letter dated 22.09.2018, informed the Corporate Debtor about initiation of proceedings under Section 138 of Negotiable Instrument Act and once again called upon it to execute a Mortgage Deed in their favour.
13. Accordingly, the Corporate Debtor executed a Simple Deed of Mortgage dated 02.10.2018 in favor of the Financial Creditor.
14. The Corporate Debtor executed Supplementary Memorandum of Agreement dated 08.02.2019 in favor of Financial Creditors offering 15% equity share each. The Corporate Debtor further assured to repay the outstanding loan on or before 30.04.2019 failing which, financial Creditor will be entitled to take possession of the flat.

15. Despite undertaking to repay the loan on or before 30.04.2019, the Corporate Debtor failed to repay the said loan along with accrued interest thereon.
16. Pursuant thereto, after several meetings and discussions, between the parties the Corporate Debtor vide its letter dated 16.01.2021, while acknowledging the outstanding loan once again sought 12 months' time to repay the entire outstanding loan along with accrued interest thereon. In good faith and with intention not to precipitate the issue any further, the Financial Creditor granted the extension. However, the Corporate Debtor failed to repay the outstanding loan along with accrued interest thereon.
17. The Corporate Debtor is clearly not in a position to service its debts.
18. Hence, due to non-payment of debts, the Petitioner filed this Petition u/s 7 of the IBC, as a Financial Creditor, for initiating the Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor.
19. The Corporate Debtor in their reply to the petition contended that the Financial creditor has failed to disclose a Record of Default with an Information Utility in the Form-I, which is a mandatory requirement under the IBC, 2016 and the rules framed thereunder. In the absence of such Record of Default, the said application is not maintainable and should be dismissed in limine.
20. The Corporate Debtor further submitted that in the recent years it has witnessed significant increase in losses and is undergoing severe financial crises. The financial constraints faced by the Corporate Debtor had in turn slowed down the execution of the projects leading to the sharp reversals in profits. It is submitted that owing to the financial distress and economical duress faced by the Corporate Debtor, it was unable to repay the outstanding loan along with the accrued interest

thereon i.e. Rs. 7,98,77,141/- (Rupees Seven Crores Ninety-Eight Lakhs Seventy-Seven Thousand One Hundred and Forty-One Only) and had been seeking extension from time to time which was last extended till 16.01.2021.

FINDINGS:

21. We have heard the Counsel appearing for the Financial Creditor and Corporate Debtor and perused the material available on record.
22. It is an undisputed fact that loan was given to the Corporate Debtor and the they have entered into Loan Agreement dated 23.12.2016, and subsequently have executed Deed of Loan Confirmation dated 31.01.2017 confirming and acknowledging the receipt of the said sum of Rs. 2,00,00,000/-. In the present case, the Financial Creditor post giving several opportunities for repayment of Loan to the Corporate Debtor sent a statutory notice dated 22.09.2018 for recovery of the said sum, subsequently it initiated the proceedings under Section 138 of Negotiable Instruments Act.
23. Additionally, The Corporate Debtor has acknowledged the debt vide acknowledgement of Debt dated 16.01.2021 annexed at pages 58-60 of the Company Petition and further asked for an extension of 12 months for repayment of the said outstanding loan. Therefore, there is a clear acknowledgement of debt and default of non-payment of money by the Corporate Debtor.
24. Considering the above discussion, we come to conclusion that the petitioner has been able to establish that there is a "Financial Debt" as defined under section 5 (8) of the Code. It has also been established that there is a "Default" as defined under section 3 (12) of the Code on the part of the Debtor. The two essential qualifications, i.e., existence of '**debt**' and '**default**' for admission of a petition under section 7 of the I&B Code, have

been, therefore, met in this case. Besides, the Company Petition is well within the period of limitation.

25. Further with respect to the contention raised in the reply filed by the Corporate Debtor that the purported Loan Agreement dated 23.12.2016 and Memorandum of Understanding dated 05.07.2017 is not duly registered and adequately stamped as per the provision of stamp act and therefore the said application is not maintainable. In view of the above contention this bench relies on the judgement of The Hon'ble Supreme Court in Curative Petition (C) No. 44 of 2023 in Review Petition (C) No. 704 of 2021 in Civil Appeal No. 1599 of 2020 of ***N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd, Civil Appeal No(S). 3802-3803 of 2020*** which states as under:-

*“224. The conclusions reached in this judgment are summarised below:
a. Agreements which are not stamped or are inadequately stamped are inadmissible in evidence under Section 35 of the Stamp Act. Such agreements are not rendered void or void ab initio or unenforceable;
b. Non-stamping or inadequate stamping is a curable defect;”*

26. Therefor in view of the above judgement the contention with respect to inadequate stamping of the Loan Agreement dated 23.12.2016, the same is a curable defect. Moreover, the admissibility of such document which are not duly stamped are not supposed to be under challenge or question before this Tribunal while dealing with Application u/s 7 or 9 of the Code. It is equally true that the proceedings u/s 7 are not akin to some recovery suit or proceedings wherein the liability of the Corporate Debtor on the basis of loan or other documents executed by it is to be ascertained. Therefore, inadequacy of any document in terms of requirement of the Stamp Act, in our considered view, cannot be made a ground to nonsuit the Petitioner in an Application u/s 7 of the Code. Rather, in such proceedings, this Tribunal simply have to arrive at a conclusion that whether the **debt and default** exist and the minimum threshold u/s 4 of the IBC is met.

27. Based on the above facts, the present case deserves to be admitted.
28. The Petitioners have also suggested the name of proposed Interim Resolution Professional in Part-3 of the Petition along with his consent letter in Form-2
29. Consequently, the petition is ordered to be **admitted**

ORDER

- a. The above Company Petition No. 590/IBC/MB/2023 is hereby allowed and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against **Diaonics Automation (India) Private Limited.**
- b. The IRP proposed by the Financial Creditor, **Mr. Rajan Rawat**, having registration No. IBBI/IPA-002/IP-N00743/2018-2019/12262, having address at 602, B Wing, Azziano, Rustomjee Urbania, Majiwada, Thane West, Mumbai- 400601, is hereby appointed as Interim Resolution Professional to conduct the Insolvency Resolution Process as mentioned under the Insolvency & Bankruptcy Code, 2016.
- c. The Petitioner shall deposit an amount of Rs. 5 Lakhs towards the initial CIRP costs by way of a Demand Draft drawn in favour of the Interim Resolution Professional appointed herein, immediately upon communication of this Order. The IRP shall spend the above amount towards expenses and not towards fee till his fee is decided by CoC.
- d. That this Bench hereby declare moratorium in terms of Section 14 of Insolvency and Bankruptcy Code, 2016 prohibiting 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; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; 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; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.

- e. That the order of moratorium shall have effect from the date of pronouncement of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.
- f. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- g. That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- h. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
- i. During the CIRP period, the management of the Corporate Debtor will vest in the IRP/RP. The board of directors of the Corporate Debtor

shall stand suspended. The members of the suspended board of directors and the employees of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.

- j. Registry shall send a copy of this order to the Registrar of Companies, Mumbai, for updating the Master Data of the Corporate Debtor.
- k. Accordingly, C.P. No. 590/IBC/MB/2023 is **admitted**.
- l. The Registry is hereby directed to communicate this order to both the parties and to IRP immediately.

SD/-

Madhu Sinha
Member (Technical)

/Aakansha/

SD/-

Reeta Kohli
Member (Judicial)