

seeking to initiate Corporate Insolvency Resolution Process (*hereinafter, CIRP*) against Sarga Udaipur Hotels and Resorts Private Limited (*hereinafter, the Corporate Debtor*).

2. The Corporate Debtor is a company limited by shares incorporated on 02.02.2007 having CIN: U55101WB2007PTC112974 under the Companies Act, 1956, with the Registrar of Companies, West Bengal, Kolkata. Its registered office is at Plot No.X-1, 2 & 3, Block EP, Sector V, Salt Lake, Kolkata-700091, within the State of West Bengal. Therefore, this Bench has jurisdiction to deal with this petition.
3. The present petition was filed in December 2019 before this Adjudicating Authority on the ground that the Corporate Debtor failed to make payment of a sum of ₹5,52,705/- (Rupees five lakh fifty-two thousand seven hundred and five only) including interest @ 13% per annum and penal interest at 2% per month till 28.11.2019.
4. The learned Counsel for the Financial Creditor stated as follows: -
 - a. The Corporate Debtor was in financial distress; therefore, it approached the Financial Creditor for sanction of a short-term loan for liquidity infusion in the company. An Inter Corporate Deposit Loan Agreement dated 19.08.2019² was entered into between the parties and the Financial Creditor sanctioned a loan of ₹5,00,000/- (Rupees five lakh only).
 - b. The said loan amount was disbursed by way of cheque dated 20.08.2019.³ As per the terms of agreement the period of loan was that of fifteen days from the date of disbursal. However, the Corporate Debtor failed to repay the said amount within the said period.
 - c. The loan amount was availed only on 05.09.2020,⁴ the same is reflected in the bank account statement of the Financial Creditor. However, the

² Page 25 of the petition

³ Page 65 of the petition

⁴ Page 28 of the petition

loan amount was not repaid despite the lapse of fifteen days even after availing of the loan. On 23.09.2019, the Financial Creditor issued a demand notice for repayment of the loan with accrued interest. A copy of the said notice is annexed to the Petition as **Annexure G** at page 29. Having received no reply to the said demand notice, the Applicant issued another notice dated 03.10.2019 recalling the loan. A copy of the recall notice is annexed to the Petition as **Annexure H** at page 30. However, no reply was received from the Corporate Debtor.

5. Apart from the aforementioned documents, the Financial Creditor has placed the following detail and documents on record:
 - a. record of the default recorded with the information utility has been submitted separately;
 - b. Name of the resolution professional proposed to act as an interim resolution professional;
 - c. Copy of sanction letter dated 16.08.2019 annexed to the Petition and marked as **Annexure C** at pages 22 and 23;
 - d. Copy of letter dated 17.08.2019 from Corporate Debtor to the Financial Creditor acknowledging the sanction letter and requesting the disbursement of the sanctioned amount, annexed with the Petition and marked as **Annexure D** at page 24.
6. The Corporate Debtor filed its affidavit in reply. Learned counsel appearing for the Corporate debtor submitted as follows:
 - a. The Corporate Debtor had suddenly gone into liquidity crunch and requested the Financial Creditor to for a short-term loan of ₹5,00,000/- for the tenure of 15 days. The Corporate Debtor had anticipated it to be a temporary crisis and expected its receivables in few days.
 - b. The Corporate Debtor had all the intentions to repay the loan, however, to the shock and surprise of the Corporate Debtor, without any notice or discussion, the Corporate Debtor received two letters dated 23.09.2019 and 05.10.2019 seeking immediate repayment of the loan amount along with interest.

- c. He submitted that the interest may be levied only after the loan was availed, therefore, the calculation of interest from the date of disbursal is wrong, denied and disputed and the Petition should be dismissed solely on this ground.
- d. The Corporate Debtor is in the hotel business which has been adversely impacted by the global pandemic. Therefore, the Corporate Debtor be allowed some time in order to repay the loan amount.
7. We have heard both the sides and perused the records.
8. At the outset, we notice that the paid-up equity share capital of the corporate debtor is ₹4.95 crore. It seemed scarcely believable that a company with such a huge paid-up capital suddenly had to borrow a sum of ₹5.00 lakh and that too for a short period of fifteen days and could not repay. Therefore, we asked for the financial statements including extracts from the annual returns of the corporate debtor for the last three financial years from the Registrar of Companies, West Bengal.
9. Upon perusal of the said financial statements, we see that the corporate debtor is a subsidiary of two public companies – Shristi Urban Infrastructure Development Limited (holding 60.61% shares) and Shristi Infrastructure Development Corporation Limited (holding the remaining 39.39%).
10. The letter of sanction dated 16.08.2019⁵ records that an intercorporate deposit of ₹5.00 lakh is being sanctioned to the corporate debtor to meet immediate working capital requirements. The term of the deposit was 15 days. Rate of interest was 13% per annum, with provision for charging penal interest @2% per month in case of default. The request letter from the corporate debtor has not been attached.

⁵ Page 22 of the petition

11. The very next date, i.e., on 17.08.2019,⁶ the corporate debtor wrote to the financial creditor, stating that the name of the company has changed from Shristi Udaipur Hotels & Resorts Private Limited to Sarga Udaipur Hotels & Resorts Private Limited with effect from 08.03.2019, that the bank accounts of the company are still undergoing the process of change of name and therefore, the amount may be disbursed only in the name of Shristi Udaipur Hotels & Resorts Private Limited.
12. It is interesting to note that the change of name of the corporate debtor took place more than five months prior to the sanction of the intercorporate deposit, but the bank accounts had not reflected that change.
13. Be that as it may, the loan was eventually availed of by the corporate debtor only on 05.09.2019, *i.e.*, more than fifteen days after the sanction. One would have expected that a company which required a deposit for only fifteen days would have been in dire need of funds to tide over some immediate urgency. However, the fact that after the sanction, the loan itself was availed of only after more than fifteen days, seems to indicate that there was no pressing urgency to have this deposit.
14. The case gets curiuser and curiuser when we notice the letter dated 23.09.2019⁷ from the financial creditor addressed to the corporate debtor. In this letter, the financial creditor notes that the cheque of ₹5.00 lakh was given to the corporate debtor on 20.08.2019, and the loan itself was repayable by 03.09.2019. As on 03.09.2019, the corporate debtor had not even banked the cheque. It was banked only on 05.09.2019. Therefore, if it was repayable on 03.09.2019, the financial creditor could have simply called a halt to the arrangement, since the corporate debtor obviously did not have any urgent requirement. The second paragraph of the letter reads, “... *It appears that you have encashed the cheque only on 5th September 2019, beyond*

⁶ Page 24 of the Petition

⁷ Page 29 of the Petition

*the date of repayment for reasons best known to you. **However, that in no way absolves you of your liability to repay the outstanding sum on 03.09.2019.***” (emphasis added) How in the world will the liability arise on 03.09.2019, when the facility itself was availed only on 05.09.2019, and that too for fifteen days, is anyone’s guess.

15. On 19.08.2019, the two companies entered into the intercorporate deposit agreement. Curiously, the board resolution in terms of which the authorised signatories executed the agreement from both sides, is not mentioned. Nor is it attached to the petition. The lending company is not a banking company, insurance company, housing finance company or a company whose principal business is of lending money to the public. Section 186(5) of the Companies Act, 2013, requires the unanimous consent of the Board of Directors of the lending company before making any such investment. There is nothing on record to substantiate that the board of the financial creditor approved the intercorporate deposit in question.
16. The documents filed with the RoC indicate that at the board meeting held on 29.01.2019, Mr Vikram Kasera was appointed as the Additional Director. However, the certified true copy of the board resolution dated 29.01.2019,⁸ states the designation of Mr Vikram Kasera as “director.” And this extract is authenticated by none other than Mr Vikram Kasera himself.
17. Form ‘C’ being certificate dated 20.08.2020 from the Information Utility, submitted by the financial creditor, states that the date of default is 04.09.2019. However, it is an admitted fact that the loan itself was availed of only on 05.09.2019. So, the date of default cannot be taken as 04.09.2019.
18. On balance, we feel that the present petition has all the ingredients of a collusive petition, contriving an artificial inability to pay so that the corporate debtor can be pushed into insolvency probably with a larger

⁸ Page 63 of the Petition

design in mind. We are not convinced that this petition is a *bona fide* petition at all. In making these observations, we are acutely conscious of the fact that “inability to pay” is not the basis on which petitions under sections 7, 9 or 10 can be admitted, and that the focus of the law has shifted from “inability to pay” to “existence of default.” We are not satisfied as to the existence of a debt and default, necessitating admission of the present petition.

19. The present petition bearing **CP (IB) No.2085/KB/2019**, therefore, deserves to be dismissed as a sham petition, and it is ordered accordingly.
20. In terms of section 7(7)(b) of the Code, the Registry is hereby directed to communicate this Order to the Financial Creditor and the Corporate Debtor by all available means including by email and WhatsApp immediately, and in any case, not later than two days from the date of this Order.
21. Certified Copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

Harish Chander Suri
Member (Technical)

Rajasekhar V.K.
Member (Judicial)

19.05.2021

SR(LRA)