IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH - I
KOLKATA

C.P (IB) No. 143/KB/2020

An application 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*;*

Ganpati Merchantile Private Limited [CIN: U51909WB2007PTC117870], having registered office at 85, NS Road,4th floor, Room No: 409, Kolkata- 700001, West Bengal.

...Financial Creditor/Petitioner

Bansidhar Agarwalla & Co. Private Limited [CIN: U62221WB1955PTC022226], having registered office at 2, Sudhir Chatterjee Street, Kolkata- 700006, West Bengal.

...Corporate Debtor

Date of Hearing: 27.04.2022

Date of Pronouncement: 18.05.2022

Coram:

Shri Rajasekhar V.K.	**:**	**Member (Judicial)**
Shri Balraj Joshi	**:**	**Member (Technical)**

Appearances (through Video Conferencing/physical)

Mr.Anirudh Wadhwa, Advocate	] ***For the Financial Creditor***
Mr.Rohit Sharma, PCS	]
Mr. Rishav Banerjee, Advocate	] ***For the Corporate Debtor***
Mr. Siddarth Makkar, Advocate	]

ORDER

Rajasekhar V.K., Member (Judicial)

Prologue

1. The Court convened *via* video conference.

2. This is a Company Petition under section 7 of the Insolvency and Bankruptcy Code, 2016 (Code) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, filed by Mr. Raj Kumar Agarwal, Director, Ganapati Merchantile Pvt. Ltd. (‘***Financial Creditor’***), duly authorized[1] *vide* Letter of Authorization dated 16th December 2019 to initiate Corporate Insolvency Resolution Process ***(‘CIRP’***) against Bansidhar Agarwalla and Company Private Limited ***(‘Corporate Debtor’)***.

3. The present Petition has been filed on the grounds that the Corporate Debtor had committed default in paying Rs. Rs.21,49,277(Rupees Twenty-One Lakhs Forty-Nine Thousand Two Hundred and Seventy-Seven only) as on 1st August 2019.The date of default is stated to be ***01st August 2019***.

4. Submission of Mr. Anirudh Wadhwa, Ld. Counsel appearing on behalf of the Financial Creditor.

4.1 At the request of the Corporate Debtor, the Financial Creditor had sanctioned an Inter-corporate Deposits dated 26.11.2018 for 122 days of Rs. 20,00,000 (Rupees Twenty Lakhs only) @13.5% interest per annum of interest value of Rs.1,49,277 calculated till 01.08.2019 (Rupees One Lakh Forty-nine Thousand Two Hundred and Seventy-Seven only) aggregating to a total sum of Rs.21,49,277 (Rupees Twenty-One Lakhs Forty-Nine Thousand Two Hundred and Seventy-Seven only)., which were also requested to be renewed through a letter dated 01.04.2019.

4.2 The Respondent repaid through cheque bearing No. 000237229 dated 02.04.2019 an aggregate payment of Rs. Rs.93,205 (Rupees Ninety-three thousand two Hundred five only) which is reflected in the petitioner’s statement of account on ***page 12*** of the petition and has issued a post-dated cheque of

[1] Power of Attorney-cum- Authorization –Page 18-21 of the Petition.

Rs.20,00,000 which got dishonored due to '***funds insufficient'*** and was returned along with return memo and later payment was also stopped and as a result, the petitioner demanded payment and on the failure of the Corporate Debtor, for repayment of outstanding debt as availed and thus , this petition.

4.3 The financial creditor submits that the total amount of default as on 01.08.2019 is Rs.21,49,277 and also submits a copy of renewal of the Inter-Corporate deposit letter *vis-a-vis* loan acceptance confirmation dated 01.04.2019 as **Annexure-C** to the petition.

4.4 The Financial Creditor has proposed the name of **Mr. Ajay Goyal, registration number IBBI/IPA-001/IP-P01083/2017-2018/11783,** email: aaa3india@yahoo.com, as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the Code and has annexed Form-2 i.e., Written Communication in terms of Rule 9 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

4.5 The financial creditor submitted the following documents to prove the existence of a Debt-

i. Ledger copy of loan sanctioned,
ii. Copy of Confirmation of Accounts by way of a letter by the corporate debtor,
iii. Statement of Account of Financial Creditor with Axis Bank showing credit received in respect of Bansidhar Agarwalla & Co.Pvt.Ltd,
iv. Copy of returned Cheque issued by the corporate debtor along with return memo.

5. Submission of Mr. **Rishav Banerjee*****, Ld. Counsel appearing on behalf of the Corporate Debtor.***

5.1 The Corporate Debtor categorically denies and disputes various submissions by Financial Creditor, save and except the matter of facts and matter of record. The alleged transaction of Inter-Corporate Loan issued to the Respondents proprietor *viz;* Bulbulitala Cold Storage for a short term of 1 year which was payable @ 13.5% interest per annum due on 01.08.2019. Further, this transaction was not with the corporate debtor which can be easily proved through the petitioner's own annexed documents i.e., proved by the copy of the petitioner's statement of Account showing debit receipt of Rs. 20,00,000 via RTGS from Axis Bank *vide* reference no. UTIBH18330022842 to Bulbulitala Cold Storage dated 26.11.2018, filed before this Tribunal.

5.2 In case the Inter Corporate Deposit is also made out by the petitioner, the purported transaction was between the petitioner and Bulbulitala Cold Storage which is a sole proprietorship concern and as such is not a ***'corporate person'*** within the definition ambit as defined under Sec 3(7) of IBC, 2016 and Sec 2(20) of Companies Act, 2013 and is liable to be dismissed.

Analysis and Findings

6. We have heard the learned counsel appearing on behalf of the Financial Creditor and the learned senior counsel appearing on behalf of the Corporate Debtor and perused the pleadings filed by the parties**.**

7. *Section 3(7) of the code provides as under :*

"Corporate Person" means a company as defined in clause (20) of section 2 of the Companies Act, 2013, a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008, or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider."

8. In light of the above, the question that needs to be replied is whether the insolvency proceedings under the code can be initiated against the sole proprietorship firm. Now, the preamble of the code provides as follows:

"An Act to consolidate and amend the laws relating to reorganisation and ***insolvency resolution of corporate persons, partnership firms and individuals*** *in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto."*

Which clearly shows that the Proprietorship firms are not included within the ambit of the code. Therefore, in case the Inter Corporate Loan was issued in the name of the sole proprietorship, and that not being a legal entity cannot sue or be sued and cannot be considered as the **corporate person**. That the purported Corporate debtor is not a Limited liability partnership firm is also borne out from the pleadings of the purported financial creditor. The petition was maintainable if there was a privity of contract between the Financial Creditor and the individual. However the said debt is not given to an individual but to a concern namely **Bulbulitala cold storages,** who has incidentally, not been named as a Corporate debtor.

Therefore, the alleged transaction undertaken between the Petitioner and the Principal borrower will not fall under the definition of Section 3(7) of IBC, 2016 in light of the foregoing.

9. We further observe that the Financial Creditor has no privity of contract with the corporate debtor, and therefore no proceedings can be initiated against the corporate debtor and accordingly reject this petition.

10. This Tribunal also places reliance on the judgment passed by the co-ordinate bench of this Tribunal dated 18.03.2020 in ***Apundarik Merchants Pvt. Ltd. vs. Bansidhar Agrawalla & Co.Pvt.Ltd. being C.P (IB)No. 1309/KB/2019,*** in which petition was similarly dismissed as there was no privity of contract between the financial creditor and the corporate debtor.

11. **C.P.(IB) No. 143/KB/2020** is accordingly dismissed.

12. The registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.

13. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

BALRAJ JOSHI
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Date: 2022.05.18 17:19:05 +05'30'

(Balraj Joshi)
Member (Technical)

Rajasekhar V K
Digitally signed by Rajasekhar V K
Date: 2022.05.18 18:52:43 +05'30'

(Rajasekhar V.K)
Member (Judicial)

This order is pronounced on 18th day of May, 2022

Sneh, LRA