THE NATIONAL COMPANY LAW TRIBUNAL
PRINCIPAL BENCH
AT NEW DELHI

Company Petition No. (IB)-1689 (PB)/2019

Under Section 7 of the Insolvency and Bankruptcy Code, 2016

In the matter of:

Modland Wears Private Limited

Applicant/Financial Creditor

Vs.

Annies Apparel Private Limited

Respondent/Corporate Debtor

Judgment delivered on: 03.12.2019

CORAM

MR. CHIEF JUSTICE (RTD.) M. M. KUMAR HON'BLE PRESIDENT

MR. S. K. MOHAPATRA, MEMBER (TECHNICAL)

For Petitioner: Mr. Aditya Diwan & Ms. Ayushi Advocates.

ORDER

S. K. Mohapatra, Member

1. M/s. Modland Wears Private Limited has filed the instant application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with a prayer to trigger Corporate Insolvency Resolution Process in respect of respondent Company M/s. Annies Apparel Private Limited, referred to as the corporate debtor.

2. The Respondent Company M/s. Annies Apparel Private Limited (CIN No. U 51311 DL 1993 PTC 051933) against whom initiation of Corporate Insolvency Resolution Process has been prayed for, was incorporated on 01.02.1993 having its registered office at 2764/17, 2nd Floor, Hamilton Road, Mori Gate, New Delhi - 110006. Since the registered office of the respondent corporate debtor is in New Delhi, this Tribunal having territorial jurisdiction over the

NCT of Delhi is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor under sub-section (1) of Section 60 of the Code.

3. It is appropriate to mention that Mr. Sanjay Gupta authorized representative of the applicant, duly authorized by the Board Resolution dated 27.09.2018 of the applicant company, has preferred the present application on behalf of the applicant for initiation of corporate insolvency resolution process against the respondent corporate debtor in terms of the provisions of the Code.

4. It is seen from the case records that despite service no one appeared on behalf of the respondent and accordingly following order was passed on 06.11.2019 with a direction to proceed *ex-parte* against the respondent company.

> *"An affidavit has been filed which shows that the service has been completed as the notice has been delivered on 01.11.2019 by speed-post and even the notices by email have been*

served which have also been attached with the affidavit of service. Despite service no one has put in appearance. Accordingly, the respondents are proceeded ex parte.

List for arguments on 21.11.2019".

5. Subsequently on 21st November, 2019 after hearing the applicant the matter was fixed for orders. As the respondent remained absent, the case of the petitioner remained unopposed.

6. It is seen from the records that the Applicant and the Corporate Debtor had executed a loan agreement dated 02.09.2016 ***("Loan Agreement")*** whereby the Applicant agreed to grant an unsecured loan for an amount *upto* Rs. 125,00,00,000/- (Rupees One Hundred Twenty-Five Crore Only) to the Corporate Debtor (borrower) at the rate of 14.10% p.a. The said loan was repayable within one year from the date of the disbursement.

7. The relevant portion of the loan agreement duly executed between the parties is reproduced below for ready reference.

"LOAN AGREEMENT

XXXX

<u>NOW THIS AGREEMENT WITNESSETH AS UNDER:-</u>

1. That the Lender hereby agree to grant as unsecured loan of amount upto Rs. 125,00,000/- (Rupees One Hundred Twenty-Five Crore only) to the borrower initially for a period of one year from the date of first disbursement.

2. The aforesaid loan shall be repaid by the borrower with-in one year from the date of disbursement.

3. That interest at the rate of 14.10% per annum shall be payable or compounded quarterly / annually or any other such terms as may be decided by both the parties with mutual consent.

4. XXX

5. That in case of default, the Borrower shall indemnify and undertake to pay all the expenses on legal actions, *proceedings, claims, demands, judgment, losses, liabilities, obligations, damages, cost and expenses imposed, asserted against or incurred by lender in the execution or performance of the terms and conditions."*

8. In terms of the loan agreement the applicant had disbursed a total amount of a total amount of Rs. 122,80,00,000/- (Rupees One Hundred and Twenty-Two Crores Eighty Lakhs only) on various instalments to the Corporate Debtor as stated at Part IV of the application. Thereafter, on 01.02.2017, the Corporate Debtor made part payment of Rs. 90,00,00,000/- (Rupees Ninety Crore only) to the Applicant as against the total loan amount disbursed by the Applicant. In support of the disbursement of loan to the respondent, applicant has enclosed certified bank statements of Axis Bank Ltd. (A/c No. 223010200025367). In addition, applicant has enclosed Form 26AS (Annual consolidated credit statement issued under Section 203AA of the Income-

tax Act, 1961) of the Applicant for the Assessment Year 2017-2018 containing details of the tax deducted by the Corporate Debtor on Interest Amount of Rs. 6,80,87,161/- @ 2% due as on 31.03.2017. Applicant has also placed on record statement showing working for computation of the outstanding amount.

9. A copy of the Letter of Interest Revision dated 30.03.2017 has also been placed on record in support of the contention that at the request of the Corporate Debtor the rate of interest was reduced to 10% with effect from 01.04.2017.

10. It has been alleged that as no further payments were received by the Applicant from the Corporate Debtor, the Applicant sent notice of demand dated 11.09.2018 to the Corporate Debtor demanding the payment of Rs. 39,47,25,418/- (outstanding as on 01.04.2017) plus interest accrued thereon, within 15 days. However, no response to the said Demand Notice was received from the respondent Corporate Debtor.

11. As per Part IV of the application the total amount claimed to be in default as on 31.03.2019 is Rs. 47,76,17,759 (Rupees Forty-Seven Crores Seventy-Six Lakhs Seventeen Thousand Seven Hundred and Fifty-Six only).

12. It is pertinent to mention here that the scheme of the Code provides for triggering the insolvency resolution process by three categories of persons namely,

a) Financial creditor

b) Operational creditor, and

c) Corporate debtor itself.

13. The procedure in relation to the Initiation of Corporate Insolvency Resolution Process by the "Financial Creditor" is delineated under Section 7 of the Code, wherein only "Financial Creditor" / "Financial Creditors" can file an application. As per Section 7(1) of the Code, an application could be maintained by a Financial Creditor either by itself or jointly with other Financial Creditors.

14. The expressions "Financial Creditor" and "Financial debt" have been defined in Section 5 (7) and 5 (8) of the Code and precisely "Financial debt" is a debt along with interest, if any, which is disbursed against the consideration for time value of money.

15. In the present case it is evident from the loan agreement and the bank statement placed on record that the applicant had sanctioned and disbursed loan amount to the respondent company. As per the loan agreement executed between the parties the disbursed loan amount is recoverable with applicable interest in terms of the loan agreement. Copy of the Letter dated 30.03.2017 placed on record shows that at the request of the Corporate Debtor the rate of interest was reduced to 10% w.e.f 01.04.2017. The corporate debtor had borrowed the credit facility against payment of interest as agreed between the parties. The loan was disbursed against the consideration for time value of money with a clear commercial effect of borrowing. Moreover, the debt claimed in the present application includes both the

component of outstanding principal and interest. In that view of the matter not only the present claim comes within the purview of '*Financial Debt*' but also the applicant can clearly be termed as '*Financial Creditor*' so as to prefer the present application under Section 7 of the Code.

16. The application filed by the applicant financial creditor has to be admitted under sub-section 5 (a) of Section 7 of the Code, on satisfaction that:

> *I. Default has occurred.*
>
> *II. Application is complete, and*
>
> *III. No disciplinary proceeding against the proposed IRP is pending.*

17. Hon'ble Supreme Court in the case of *Mobilox Innovations Private Limited V. Kirusa Software Private Limited reported in* AIR 2017 SC 4532 at Para 19 has observed that:

> *"Once the adjudicating authority / Tribunal is satisfied as to the existence of the default and has ensured that the application is complete and no disciplinary proceedings are*

pending against the proposed resolution professional, it shall admit the application."

18. An application under Section 7 of the Code is acceptable so long as the debt is proved to be due and there has been occurrence of existence of default. What is material is that the default is at least 1 lakh. In view of Section 4 of the Code, the moment default is of Rupees one lakh or more, the application to trigger Corporate Insolvency Resolution Process under the Code is maintainable.

19. It is seen that the applicant financial creditor has placed documentary evidence in relation to the disbursement of the loan to the respondent company. The materials on record and the loan documents clearly depict that the loan was sanctioned, disbursed and the loan agreements were properly executed. Respondent company utilized and enjoyed the loan facility from time to time. It is seen that the applicant 'financial creditor' has placed on record sufficient evidence in support of the claim as well as to prove the default.

20. It is pertinent to mention here that the Code requires the adjudicating authority to only ascertain and record satisfaction in a summary adjudication as to the occurrence of default before admitting the application. The material on record clearly goes to show that respondent had availed the loan facilities and has committed default in repayment of the balance outstanding loan amount.

21. It is further seen that in compliance of the provisions of the Code the applicant financial creditor has filed the present application under Section 7 of the Code in the requisite FORM-1 to initiate Corporate Insolvency Resolution Process against the respondent Corporate Debtor under the Code.

22. Applicant has furnished the required information and other facts including loan documents in support of outstanding debt and default. The applicant has annexed to the application detail particulars of 'financial debt' including loan documents, records and evidence of default as required under subsection 3 (a) of Section 7 of the

Code. On a bare perusal of the Form reveals that the same is complete in all respect and there is no infirmity in the same.

23. Sub-section (3) (b) of Section 7 further mandates the financial creditor to furnish the name of an Interim Resolution Professional. In compliance thereof the applicant has proposed the name of Mr. Rajiv Bajaj, for appointment as Interim Resolution Professional having registration number IBBI / IPA-002 / IP-N00276/ 2017-18 / 10834 resident of 4/180, Backside, Ground Floor, Shubhash Nagar, New Delhi - 27 with email - id rbajajip@gmail.com. Mr. Rajiv Bajaj agreed to accept the appointment as the interim resolution professional and has signed a communication dated 08.04.2019 in Form 2 in terms of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. *There is a declaration made by him that no disciplinary proceedings are pending against him in Insolvency and Bankruptcy Board of India or elsewhere.* He has also enclosed the copy of

Certificate of Registration dated 7th August, 2017 issued by IBBI. In addition, further necessary disclosures have been made by Mr. Rajiv Bajaj as per the requirement of the IBBI Regulations. Accordingly, he satisfies the requirement of Section 7 (3) (b) of the Code.

24. It is accordingly seen that the present application filed under Section 7 of the Code is complete and there are no disciplinary proceedings pending against the proposed interim resolution professional and that there is a financial debt due and default in repayment of the said financial debt has occurred.

25. It is pertinent to state here that the corporate debtor is entitled to point out to the Adjudicating Authority that a default has not occurred; in the sense that a debt, which may also include a disputed claim is not due i.e. it is not payable in law or in fact. However, despite service respondent preferred not to contest the present application. The claim of the petitioner financial creditor thus remained undisputed.

26. It is further seen that vide affidavit dated 19.09.2019 the applicant financial creditor has affirmed that the order dated 05.04.2019 passed by the Hon'ble Supreme Court of India would have no bearing on the present petition nor any stay has been granted in respect of the present proceedings by the Hon'ble Supreme Court or for that matter by the High Court.

27. In the facts it is seen that the applicant clearly comes within the definition of Financial Creditor. The material placed on record further confirms that applicant financial creditor had disbursed various loan amounts to the respondent corporate debtor and the respondent has availed the loan and committed default in repayment of the balance outstanding financial debt. On a bare perusal of Form – I filed under Section 7 of the Code read with Rule 4 of the Rules shows that the form is complete and there is no infirmity in the same. It is also seen that there is no disciplinary proceeding pending against the proposed IRP. We are satisfied that the present application is

complete in all respect and the applicant financial creditor is entitled to claim its outstanding financial debt from the corporate debtor and that there has been default in payment of the financial debt.

28. As a sequel to the above discussion and in terms of Section 7 (5) (a) of the Code, the present application is admitted.

29. Mr. Rajiv Bajaj having registration number IBBI / IPA-002 / IP-N00276/ 2017-18 / 10834 resident of 4/180, Backside, Ground Floor, Shubhash Nagar, New Delhi - 27 with email - id rbajajip@gmail.com. is appointed as an Interim Resolution Professional.

30. We direct the applicant Financial Creditor to deposit a sum of Rs. 2 Lac with the Interim Resolution Professional namely Mr. Rajiv Bajaj to meet out the expenses to perform the functions assigned to him in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within three days from the date of receipt of this order by the

Financial Creditor. The said amount however be subject to adjustment towards Resolution Process cost as per the applicable rules.

31. In pursuance of Section 13 (2) of the Code, we direct that public announcement shall be made by the Interim Resolution Professional immediately (3 days as prescribed by Explanation to Regulation 6(1) of the IBBI Regulations, 2016) with regard to admission of this application under Section 7 of the Insolvency & Bankruptcy Code, 2016.

32. We also declare moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed:

> *"(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;

(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;

(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."

33. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government or the supply of the essential goods or services to the Corporate Debtor as may be specified, are not to be terminated or suspended or interrupted during the

moratorium period. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which has come into force w.e.f. 06.06.2018, the provisions of moratorium shall not apply to the surety in a contract of guarantee to the corporate debtor in terms of Section 14 (3) (b) of the Code.

34. The Interim Resolution Professional shall perform all his functions contemplated, inter-alia, by Sections 15, 17, 18, 19, 20 & 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, Rules and Regulations. It is further made clear that all the personnel connected with the Corporate Debtor, its promoters or any other person associated with the Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional as may be required by him in managing the day to day affairs of the 'Corporate Debtor'. In case there is any violation committed by the ex-management or any

tainted/illegal transaction by ex-directors or anyone else, the Interim Resolution Professional would be at liberty to make appropriate application to this Tribunal with a prayer for passing an appropriate order. The Interim Resolution Professional shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor' as a part of its obligation imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code, Rules and Regulations.

35. Directions are also issued to the ex-management to provide all documents belonging to the corporate debtor and lying in their possession and also to furnish every information in their knowledge within a period of one week from the admission of the petition to the IRP, otherwise coercive steps to follow.

36. The office is directed to communicate a copy of the order to the Financial Creditor, the Corporate Debtor, the Interim Resolution Professional and the Registrar of Companies, NCT of Delhi & Haryana at the earliest possible but not later than seven days

from today. The Registrar of Companies shall update its website by updating the status of 'Corporate Debtor' and specific mention regarding admission of this petition must be notified to the public at large.

-Sd-

(M.M. KUMAR)
PRESIDENT

-Sd-

(S. K. MOHAPATRA)
MEMBER (T)

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