

IN THE NATIONAL COMPANY LAW TRIBUNAL,

KOLKT BENCH,

KOLKATA

C.P (IB) No. 1954/KB/2019

In the matter of

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.

And

In the matter of:

Janardan Prasad Mahto S/o Ishwar Chandra Mahato, Resident of 28, Baliguma, P.O. M.G.M. College, Jamshedpur-831018

... Financial Creditor

Versus

In the matter of:

Durga Developers Pvt.Ltd., CIN U70200JH1997PTC007960 having its registered office at Mohan Marketing Complex, Near Argora Chowk, Opposite IDBI Bank, Ashok Nagar, Ranchi- Jharkhand-834002.

...Corporate Debtor

Date of hearing : 10/06/2022

Order Pronounced on : 29/06 /2022

Coram:

Mr. Rohit Kapoor, Member (Judicial)

Mr. Harish Chander Suri, Member (Technical)

Counsels appeared through Video Conference

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|--------------------------------|------------------------------|
| 1. Mr. Jishnu Chowdhury, Adv. |] For the Financial Creditor |
| 2. Md.Dilawar Khan , Adv. |] |
| 3. Mr. Kamran Hussain,Adv |] |
| | |
| 1. Mr. Sonal Shah, Adv. |] For the Corporate Debtor |
| 2. Mr. Aniket Chowdhury , Adv. | |
| 3. Mr.Kushagra Shah, Adv. | |

ORDER

Per: Harish Chander Suri, Member (Technical)

1. The Court is convened by video conference today.
2. This petition 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 has been filed by **Janardan Prasad Mahto**, through its Director namely Mr. Pramod Kumar Eshwa, authorised *vide* Board Resolution dated 27.09.2019 (Annexure-2) (hereinafter referred to as the Financial Creditor) for initiation of Corporate Insolvency Resolution Process in respect of **Durga Developers Pvt.Ltd.**, having CIN U70200JH1997PTC007960, a corporate entity (hereinafter referred to as the Corporate Debtor).
3. It is submitted that the Corporate Debtor is in the business of real estate development of residential, commercial and rural properties for prospective buyers and sellers and Mr. Niloy Kumar Jha, one of the Directors of the Corporate Debtor who is taking care of its affairs. He took a loan of Rs.46,01,000/- from the Financial Creditor through undertaking which was given on the stamp by Mr. Niloy Kumar Jha in the capacity of the Director on behalf of the Corporate Debtor.
4. It is submitted that the Financial Creditor requested the Corporate Debtor through phone calls and meetings but the Corporate Debtor did pay the outstanding debt of Rs.46,01,000/- and instead of paying the Outstanding Debt, the Corporate Debtor *vide* letter dated 17.10.2019 refused to repay the outstanding debt and forced the Financial Creditor to adjust the outstanding debt in the project "Shivam Plaza" in which neither any builder buyer agreement executed in the favour of the Financial Creditor nor is he interested in the aforesaid project. It is submitted that in the aforesaid letter, the Corporate Debtor admitted the outstanding debt of Rs.46,01,000/- which would act as Acknowledgement of Debt in this application. It is submitted

that the last tranche of payment of loan was completed on 10th July, 2008 and the repayment of the entire loan had to be within 6 months. Accordingly, the last date of payment was to be made on or before, 10th January, 2009. Therefore, the date of default in the present proceedings arose on 11th January, 2009 and when the Corporate Debtor had failed to make payment, the claim of the Financial Creditor remains alive till 10th January, 2012. It is submitted that the accounts between the parties is open, running and continuous and there have been in writing by the Corporate Debtor on 14th September, 2010, 25th April, 2011, 16th April, 2014 and 16th January, 2017.

5. It is further submitted that acknowledgement was issued each time before expiration of the prescribed period for recovery. Therefore, the claim remained alive till January, 2020. Therefore, the date of default of these proceedings would be within the period of limitation. It is submitted that the total amount of debt due is Rs.2,84,15,435/- and the date of default arose on 10th January, 2009 and was extended by acknowledgement from time to time upto 16th July, 2017. The amount outstanding comprises the principal sum Rs.46,01,000/- being the money advanced by the Financial Creditor along with compound interest @ 18% per annum from the date of last payment till the actual date of payment amounting to Rs.2,38,14,435/- upto 31.10.2019.

6. The Financial Creditor has enclosed with the petition the following documents:-

- a. A copy of the Master Data of the Corporate Debtor;
- b. A copy of the Undertaking given on stamp paper along with Calculation sheet of the payments;
- c. A copy of the letter dated 17.10.2019 issued by the Corporate Debtor to the Financial Creditor.
- d. A copy of the letter dated 28.10.2019 issued by the Corporate Debtor to the Financial Creditor
- e. Copies of Letters dated 14th September, 2010, 25th April 2011, 16th April, 2014, 16th April, 2014, 16th January, 2017 by the Corporate

Debtor acknowledging its liability.

- f. Copies of letters dated 30th March, 2011, 23rd February, 2014 and 18th December, 2016 issued by the Financial Creditor.
- g. Form 2 denoting the name of the proposed IRP.

7. On being served with the notice of the court, the Corporate Debtor has filed its reply affidavit.

8. In reply to the amended petition , the Corporate Debtor has submitted as under:-

- “ i. The instant application is mala fide, frivolous, abusive and a desperate attempt to eliminate the purported financial creditor’s liability towards the Corporate Debtor in terms of its agreement to pay consideration for the flats that he along with his family members have booked in the various projects of the of the Corporate Debtor.
- ii. The applicant is not and cannot be a financial creditor and is at best a home buyer.
- iii. Even assuming that the purported Financial Creditor has a financial claim so as to approach this Adjudicating Authority, the purported claim is hopelessly barred by laws of limitation.
- iv. There is no loan advanced by the Financial Creditor and nothing will be borne out from the application.
- v. There is no interest rate at all mentioned anywhere nor has any demand for interest or repayment ever made.
- vi. The Corporate Debtor states that it is in the business of Real Estate development of residential and commercial prospective which it in turn sells to prospective buyers. In 2007, the applicant herein along with his wife Ms.Vinita Kumari, sons and grandsons had approached the Corporate Debtor to book one flat at a project of the Corporate Debtor being “Shivam Plaza” being

- flat no. 601 on the 6th Floor, while in 2019 they had approached the Corporate Debtor for a flat in the Mohan Marketing Complex being flat no. 601/A and two flats at Shivam Heights.
- vii. Except for a portion of the instalment amounts against the flats at Shivam Plaza no other payment was made in cash. The cash payment made was accounted for in a stamp paper. The Financial Creditor paid a sum of Rs.47,01,000/- against the flat leaving an outstanding of Rs.59,56,500/- against the consideration amount and a further sum on interest on outstanding sum. Copies of the money receipts and the stamp paper whereunder money was received by the Corporate Debtor in cash are annexed with the letter-A.
- viii. The Corporate Debtor had from time to time sought for payment of the balance consideration amount so that the deed of sale for the Shivam Plaza flat could be executed and the possession of the flat be made over. In reply to such request the Financial Creditor who along with his family members had booked flats and made payments against it had sought for adjustment of the sum of Rs.47,01,000/- paid for Shivam Plaza flat against the outstanding amount of Rs.1,25,22,000/- for the Mohan Marketing Complex Flat.
- ix. The Corporate Debtor was unable to do so and had by its letter dated 17th October, 2019 sought for payment of outstanding dues. The request was further renewed on 28th October, 2019 and 6th November, 2019 but the same was never replied to by the applicant. Copies of the numerous letters demanding payment are annexed as Letter-B.
- x. Never during the course of such transactions did the purported Financial Creditor ever utter of such loan or loan or has even claimed the same from the Corporate Debtor by issuing any demand letter.
- xi. The Corporate Debtor thus states that the purported claim of the

purported Operational Creditor is false and baseless.

9. It is submitted that all other averments and allegations made in the petition are denied by the Corporate Debtor.

10. The Financial Creditor has filed a copy of the undertaking given on stamp paper along with calculation sheet of the payments and copies of letters dated 17th October, 2019 and 28th October, 2019 allegedly admitting and acknowledging the liability.

11. During the course of arguments, Ld. Counsel for the Financial Creditor submitted that the principal debt of Rs.46,01,000/- has been duly acknowledged by the Corporate Debtor, Durga Developers Pvt. Ltd. and despite several requests, the Corporate Debtor did not pay the aforesaid outstanding debt and the Corporate Debtor forcing the Financial creditor towards the outstanding debt in project “ Shivam Plaza”, in which neither any builder Buyer agreement was executed in favour of the Financial Creditor nor he is interested in the aforesaid project.

12. Ld. Counsel for the Corporate Debtor however in his arguments submitted that the Financial Creditor has tried to make out the case that Niloy Kumar Jha, one of the Director of the Corporate Debtor took loan of Rs. 46,01,000/- from the Financial Creditor through undertaking which was given on the stamp by Mr. Niloy Kumar Jha in the capacity of the Director on behalf of the Corporate Debtor. The date of disbursement of the purported loan is not mentioned in the application nor are any terms of grant of the purported loan mentioned therein. It is further submitted that though the application in column 8 of part V mentions a purported undertaking, a perusal of the same at page 23 of the application nowhere mentions (i) the name of the Financial Creditor having granted the purported loan, (ii) the name of the Corporate Debtor purported to have taken a loan, or (iii) any term which binds the Corporate Debtor with any financial liability meaning thereby for how long and at what percent interest. He further submitted that there is

no stamp or seal mentioned in the purported document being relied upon by the Financial Creditor.

13. It is further submitted that the said document merely mentions a few sums received by some individuals and relates to purported sum of Rs.28,00,000/- only. There is no detail of the purported sum of Rs.46,01,000/- as contended to having been given as loan to the Corporate Debtor. Therefore, no debt in terms of section 3(ii) being “a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt” is borne out from the said document at least as against Corporate Debtor.

14. It is submitted that there is no “financial debt” in terms of section 5 (8)(a) of the Code being owed by the Corporate Debtor to the Financial Creditor. Financial debt is defined as a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes money, borrowed against payment of interest. There is nothing in the petition, which shows payment of interest. The said undertaking only mentions once “Received Rs.3,00,000/- cash on 03.10.2007. This amount payable shall be Rs.4,50,000/-. With regard to other purported entries, there is no consideration for time value of money.

15. It is trite that an application under section 7 contemplates that Adjudicating Authority, to be satisfied with and come to a finding that i) there is a debt; ii) default should have occurred; iii) debt should be due to financial creditor and iv) such default should be by a Corporate Debtor. The Hon’ble Supreme Court has in numerous judgments held that a financial creditor’s application, it is necessary that whether default has been committed or not has to be first determined. (**Swiss Ribbons judgment; Innoventive Industries**) Judgment; The courts have come heavily on unwritten agreements and oral agreement which are incapable of establishing a financial loan. Pawan Agarwal vs. Utsav Securities (NCLAT) (CA) (AT) (Ins) No. 251 of 2050). Utsav Securities vs. Timeline Buildcon (NCLT Delhi) CP 1559

(PB) of 2019. Prayag Polytech Pvt. Ltd. Vs. Gem Batteries Pvt. Ltd. (NCLT New Delhi) CP (AT) (Insolvency) No. 713 of 2019.

16. Having gone through the entire petition, reply, rejoinder along with documents placed on record by the Ld. Counsel for the parties, we noticed that the Financial Creditor has completely failed to prove any financial debt due and payable by the Corporate Debtor. Whatever documents have been placed on record by the Financial Creditor, do not prove any financial debt against the Corporate Debtor.

17. We have heard Ld. Counsel for the parties and we are, therefore, not at all satisfied with the petition and documents placed on record by the Financial Creditor. We find that there is no substance in this petition for initiation of CIRP against the Corporate Debtor.

18. We, therefore, **dismiss** the petition.

19. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

(Harish Chander Suri)
Member (Technical)

(Rohit Kapoor)
Member (Judicial)

Order signed on, this 29th day of June, 2022

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