

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH, HYDERABAD**

CP (IB) No.198/7/HDB/2019
U/s. 7 of the I B Code, 2016,
R/w. Rule 4 of the Insolvency and Bankruptcy
(Application to Adjudicating Authority) Rules, 2016.

**In the matter of
M/s. Sai Krishnodaya Industries Private Limited**

Between:

M/s. Sarwottam Ispat Limited
Represented by its Director,
Mr. Subhash Goenka
206, Swapnalok Complex,
S.D.Road, Secunderabad – 500 003.

...Petitioner/
Operational Creditor

And

M/s. Sai Krishnodaya Industries Private Limited
Rep. by its Director,
Mr. Saini Satyanarayana Rao,
D.No.1-8-333 & 334, "A", Wane,
Near HUDA Office, US Consulate Lane,
Begumpet, Secunderabad – 500 016.

...Respondent/
Corporate Debtor

Date of Order: 17.10.2019.

**Coram: Shri. K. Anantha Padmanabha Swamy, Member Judicial.
Dr. Binod Kumar Sinha, Member Technical.**

Parties/Counsels present:

For the Petitioner/Operational Creditor:
Mr. Sharad Sanghi, Advocate

For the Respondent/Corporate Debtor:
Mr. D.V.A.S Prasad along with Mr. P. Pratap Goud, Advocates.

Per: Dr. Binod Kumar Sinha, Member Technical.

ORDER

1. Under consideration is a Company petition filed by M/s. Sarwottam Ispat Limited (in short Petitioner/Financial Creditor), a company registered under the Companies Act, 1956 and having its registered office at #206, Swapnalok Complex, S. D. Road, Secunderabad – 500





003 against M/s. Sai Krishnodaya Industries Private Limited (in short Respondent/Corporate Debtor), a Company registered under the Companies Act, 1956 and having its registered office at #. D. No. 1-8-333&334, "A" Wane, Near HUDA Office, U. S. Consulate Lane, Begumpet, Secunderabad – 500 016 under section 7 of the Insolvency and Bankruptcy Code, 2016 (in short IB Code 2016) r/w Rule 4 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (in short, IB Rules 2016).

2. Brief facts of the present case, inter-alia, are as under:

- a. That, pursuant to an understanding between the Financial Creditor and the Corporate Debtor, the Petitioner Company has disbursed a loan to Corporate Debtor. That the financial Creditor has disbursed an amount of Rs. 1,45,00,000/- in various tranches on 24.03.2013. The total Financial Debt is Rs. 1,55,90,480/- including interest from 01.06.2018 to 30.11.2018 @ 15% p.a.
- b. That sister concern of Corporate Debtor i.e., M/s. Sainath Estates Private Limited has issued a letter dated 06.09.2016 stating that *'the loan amount would be paid between October to December, 2016 without fail'*.
- c. That after much persuasion, the Financial Creditor and Corporate Debtor executed a Memorandum of Understanding dated 29.11.2017 and according to the MOU, M/s. Sainath Estates Private Limited (Sister concern of Corporate Debtor) issued two post-dated cheques dated 31.03.2018 for Rs. 1,00,00,000/- and cheque dated 31.05.2018 for Rs. 45,00,000/- respectively towards repayment of the said loan pertaining to the Corporate Debtor. That, the Financial Creditor has deposited both the cheques and the same were dishonoured with an endorsement "Insufficient Funds".

- d. The total amount in claim is Rs. 1,55,90,480/- along with interest @ 15% p.a.
- e. The learned Counsel for the petitioner/Financial Creditor while reiterating the above submitted that the Respondent/Corporate Debtor is unable to pay its debts and therefore it has no other option except approaching this Adjudicating Authority under I & B Code seeking an order for commencing the Corporate Resolution Process and prayed for an appointment of IRP to take over the affairs of the Respondent/Corporate Debtor.
3. Counsel for the Respondent filed interim reply, final reply and written submissions inter-alia stating as under:
- a. That the petition is barred by limitation as the alleged loan pertains to the year 2013, the petition is hit by the Law of Limitation Act, therefore the instant petition is liable to be dismissed as barred by Limitation.
- b. The Annexures 'H & I' (at page No. 130-134) dated 16.09.2016 and 29.12.2017 clearly refers to the liabilities of the sister concern company of the Corporate Debtor i.e., M/s Sainath Estates Pvt Ltd and the supplies made to it about six year old, the Financial Creditor has knowingly demanded the alleged dues under the said supplies until 29.12.2017 on which date, the Financial Creditor and the Corporate Debtor has entered in to a Compromise wherein it was clearly understood that the said Sister concern Company shall clear its dues and accordingly the Financial Creditor has accepted the Cheques from the said Sainath Estates Pvt Ltd towards the payment of alleged debt and thereby discharged the Corporate Debtor from the said alleged debt or liability.
- c. That the said M.O.U is valid until 31.05.2018 only and after that day, it shall be treated as null and void.

- d. That the Petitioner is actually an Operational Creditor in view of their business relations concerned with Sainath Estates Private Limited.
- e. That Sainath Estates Private Limited is undergoing the CIRP process on account of the Orders dated 08.08.2019, passed in CP(IB) No. 571/7/HDB/2018, by NCLT, Hyderabad Bench and therefore, the instant petition is liable to be dismissed.
- f. The Petitioner Company herein has failed to show that how it could fit into the definition given under Sub-section 7 of Section 5 of the IBC, 2016, that it is a corporate person.
- g. That the petition is filed on false and baseless grounds as such it is not maintainable for the simple reason that the Corporate person in terms of PART I Sub section (7) of Section 3 of the IBC, 2016 shall not include the Financial Service Provider, therefore, neither the Petitioner Company herein, being a Corporate Person in terms of Sub-section (20) of Section 2 of the Companies Act, 1956 could be termed as Financial Creditor, nor the alleged bank entry dated 24.04.2013 could be equated with the definition of Debt provided in Sub-section (11) of Section 3 of the IBC, 2016.
- h. That the Petitioner Company has failed to furnish any documents provided in Sub-section (3) of Section 7 of IBC, 2016 nor it has furnished any evidence that the Corporate Debtor has agreed to pay any Interest thereon towards the time value of money, more particularly in the light of the fact that MOU dated 29.11.2017 does not speak of payment of any interest. Therefore the instant petition is not maintainable and liable to be dismissed.
- i. That as per section 293 of the Companies Act, 1956, any amount to be borrowed by the Company along with amount already acquired by the Company exceeds the aggregate of its paid up share capital

and free reserves then the consent of the company through a special resolution shall be taken. Whereas in the present case, nothing of that sort is placed on record, which goes without saying that the alleged loan transaction is without any basis and far from reality excepting that the petitioner company illegally attempting to fasten fabricated debt and liability on the Corporate Debtor without any valid reason.

- j. That the alleged bank loan entry dated 24.04.2013 is not loan instead it is the repayment/entry adjustment of the two companies in normal course of business transactions of purchases and supplies etc., and nothing more than that.
- k. That the auditors' report as at 31.03.2016 of the Petitioner company inter-alia discloses that *"the company has granted loans, the schedule of repayment of principal and interest has been stipulated and receipts and regular and that there is no such amount which is overdue more than 90 days of above mentioned loan"*.
- l. That the auditors' report as at 31.03.2017 of the Petitioner company discloses that *"the Company has not granted any loans secured or unsecured to companies, firms or other parties in the Registers maintained under section 180 of the Companies Act, 2013"*.
- m. That in view of the above report of the Auditor of the Petitioner Company, the endeavour of the Petitioner Company is established beyond any doubt, and it is a clear case of inconsiderate and obnoxious attitude.
- n. That the Corporate Debtor herein has furnished the copies of its three preceding Annual Returns for the years 2015-16 to 2017-18 in evidence of the fact that its financials do not reflect the alleged loan at par.



- o. The petitioner company has already invoked the IBC 2016 against M/s. Sainath Estate Private Limited and if there is any amount is to be claimed, the same is to be made in the matter of M/s. Sainath Estates Private Limited. Given that fact, the Petitioner Company has no locus standi to invoke the provisions of the IBC, 2016 against the Corporate Debtor.
- p. The learned Counsel for the Corporate Debtor has also relied on the following judgements of Hon'ble NCLAT in support of his submissions which are as under:

Company Petition No. (IB) 400/KB/2017 - in the matter of Smt. Srikanta Sarada Vs M/s. Tansway Marketing Private Limited,

Company Petition No. (IB) 792/PB/2018 - in the matter of M/s. Carnoustie Management India Private Limited Vs CBS International Projects Private Limited;

Company Petition No. (IB) 346/2018 - in the matter of Dr.Vishnukumar Agarwal Vs M/s. Piramal Enterprises Limited

Reiterating above, the Counsel for the respondent prayed to dismiss the instant Petition.

4. Heard both the sides and perused the record.
5. It is the case of the Financial Creditor that it has provided loan of Rs. 1,45,00,000/- to the Corporate Debtor on 24.04.2013 on its request and the same was transferred to the account of the Corporate Debtor through RTGS in three tranches on the same day, whereas the Corporate Debtor contended that the said bank entries are not related to any loan provided by the Petitioner, but they are the business entries

done in the normal course of business between two entities. At this juncture, the MOU entered into between the petitioner and the Corporate Debtor on **29.11.2017** and the letter dated **06.09.2016** issued by M/s. Sainath Estates Private Limited becomes important to adjudicate upon the instant case. In the letter dated 06.09.2016, M/s. Sainath Estates Private Limited while confirming the transaction stated that ***“The total principal amount for Rs. 3,67,03,420/- is payable to as per the details given below”*** and in Sl. No. (3) it is stated that ***“Advance given to our sister concern Company Sai Kirshnodaya Industries Private Limited – Rs. 1,45,00,000/-”***. In the said letter M/s. Sainath Estates Private Limited categorically admitted the amount mentioned in the letter i.e., ***“Principal Amount”*** and it is deemed that it has not added the interest portion of the amount payable to the Petitioner. It is also categorically admitted in the said letter that the petitioner company has provided an advance of Rs. 1,45,00,000/- to the Corporate Debtor, however, it has not been clearly stated that whether that was towards trade advance or loan advance. In this place, the MOU dated 29.11.2017 plays a vital role to decide the present matter. In the second page of the MOU it is recorded that ***“(1) SKIPL for its business needs had requested SARWOTTAM for a Loan of Rs. 1,45,00,000/- and (2) SARWOTTOM had extended a Loan of Rs. 1,45,00,000/- to SKIPL”***. Thus, it is clear from the above recitals that the Corporate Debtor has requested for a loan of Rs. 1,45,00,000/- and the Financial Creditor has extended the same to the Corporate Debtor. As such it is clear that it is not a trade advance and it is only a loan. In the said MOU the outstanding amount was fixed at Rs. 1,45,00,000/- however, under para (2) of the Memorandum it is recorded that ***“In the event of complete payment is made accordingly, M/s. Sai Krishnodaya Industries Private Limited will be discharged of all the liabilities to make any further***

payments to SARWOTTAM ”. While recording about the issuance of cheques, it is recorded in 2nd page at para (4) of the MOU that the post dated cheques dated 31.03.2018 and 31.05.2018 are issued by M/s. Sainath Estates Private Limited, a sister concern company of SKIPL on behalf of SKIPL, and as per the said clause it is deemed that the cheques were issued by M/s. Sainath Estates Private Limited only on behalf of the Corporate Debtor and the time limit has also been fixed as 31.03.2018 and 31.05.2018. Para (5) of the MOU speaks about the action that could be taken by the petitioner against the Corporate Debtor if the cheques are not realized and para (6) speaks about the assurance of the Petitioner that it has not filed any civil/criminal or insolvency proceedings against the Corporate debtor and it is recorded in the said para that *“further assure not to initiate any such proceedings till SKIPL comply with the terms and conditions contained in this MOU without there being any default”*. The para (7) of the MOU speaks about the validity of the MOU and it is recorded in the said para ***“this agreement will be valid until 31.05.2018 and be treated as null and void if SKIPL fails to make the payment within the due date and the account status will immediately stand as due to the extent of balance amount (after deducting the payments made hereafter)”***. Since, the Corporate Debtor failed to make the payments, it is deemed that the account status would stand as due from the Corporate Debtor.


6. The MOU dated 29.11.2017 (page 131-134) and the letter dated 06.09.2016 (page 13) and the bank statement (page at 143 and 144) are on record in the proceedings before this Adjudicating Authority. As per the recitals of the MOU the Corporate Debtor admitted that it has requested for a loan from the Petitioner and the Petitioner has also extended the same, therefore, it is not difficult to say that the

transactions pertain to the loan only. It is also on record that the cheques were issued by M/s. Sainath Estates Private Limited on behalf of the Corporate Debtor and same were dishonoured. The MOU has also fixed the time limit as 31.05.2018 and on the said date the MOU would become invalid and the amount become due from the Corporate Debtor. Further, the Corporate Debtor would be liable to make further payments towards balance on its failure. The averment of the Corporate Debtor is not substantiated as the said amount was transferred through RTGS to the account of the Corporate Debtor and it has not proved with any documentary evidence that the payment was made for some other purpose by the petitioner. The judgments quoted by the learned Counsel for the Corporate Debtor are not applicable to the facts of the present case.

7. Further in view of the acknowledgment of the debt by the Corporate Debtor through MoU dated 29.11.2017, the instant petition falls well within Limitation, in terms of sec.18 of the Indian Limitation Act, 1963.
8. With regard to the contention of the Corporate Debtor regarding the proceedings filed in CP (IB) No. 573/9/HDB/2018, by the Petitioner herein against the sister concern of the Corporate Debtor M/s. Sainath estates Pvt Ltd as seen from the Copy of the said Company Petition filed along with Final Reply, the same is found no way relevant and has no bearing to the transactions between the Financial Creditor and Corporate Debtor herein. Therefore, the same does not constitute any valid ground for rejection of the instant Petition.
9. In view of above observation, this Adjudicating Authority is satisfied with the submissions put forth by the Petitioner/Financial Creditor regarding existence of 'financial debt' and occurrence of 'default'. Further, the Financial Creditor has fulfilled all the requirements as contemplated under IB Code in the present Company Petition and has

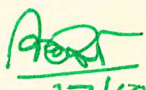
also proposed the name of IRP after obtaining his written consent in Form-2. In view of the above, this Adjudicating Authority is inclined to admit the petition.

10. The instant petition is hereby admitted and this Adjudicating Authority Orders the commencement of the Corporate Insolvency Resolution Process which shall ordinarily get completed as per the time line stipulated in section 12 of the IB Code, 2016, reckoning from the day this order is passed.
11. This Adjudicating Authority hereby appoint Mr. Arun Kumar Malani, as IRP as proposed by the Financial Creditor vide memo dated 29.03.2019. There is no disciplinary proceedings pending against the IRP as evidenced from Form-2 and his name is reflected in IBBI website. The IRP is directed to take charge of the Corporate Debtor's management immediately. He is also directed to cause public announcement as prescribed under Section 15 of the Insolvency and Bankruptcy Code, 2016 within three days from the date the copy of this order is received, and call for submissions of claim in the manner as prescribed.
12. The moratorium is hereby declared which shall have effect from the date of this Order till the completion of Corporate Insolvency Resolution Process, for the purpose referred to in Section 14 of the I & B Code, 2016. It is hereby ordered to prohibit all of the following, namely:-
 - 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;*

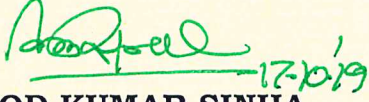

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- c) Any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 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.
13. However, the supply of essential goods or services of the Corporate Debtor shall not be terminated or suspended or interrupted during moratorium period. Further, the provision of Sub-section (1) of Section 14 shall not apply to such transaction, as notified by the Central Government.
14. The IRP shall comply with the provisions of Sections 13 (2), 15, 17, & 18 of the Code. The directors of the Corporate Debtor, its promoters or any person associated with the Management of the Corporate Debtor is expected to extend all assistance and cooperation to the IRP as stipulated under Section 19 and for discharging his function under Section 20 of the I & B Code, 2016.
15. The Operational Creditor and the Registry are directed to send the copy of this Order to IRP so that he could take charge of the Corporate Debtor's assets etc., and make compliance with this Order as per the provisions of I & B Code, 2016.
16. The Registry is directed to communicate this Order to the Financial Creditor and the Corporate Debtor.
17. The detailed address of the IRP is as follows:-
- Mr. Arun Kumar Malani
Insolvency Professional
(IBBI/IPA-001/IPA-001/IP-P00275/2017-18/10519)
#6-1-68/3/33
Dream Valley Shivarampally
Pillar No.3306, Rajendra Nagar,
RR Dist. Hyderabad - 500052
Email ID:arunkumarmalani@gmail.com.



18. The present Petition bearing CP (IB) No.198/7/HDB/2019 is hereby admitted.



Dr. BINOD KUMAR SINHA
MEMBER TECHNICAL



K. ANANTHA PADMANABHA SWAMY
MEMBER JUDICIAL

SKRathi/RK