IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH - I
KOLKATA

C.P (IB) No. 1781/KB/2019

A 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.

In the matter of:

Drolia Agencies Private Limited [U51109WB1984PTC038046]

...Financial Creditor

Versus

HS Mercantile Limited (CIN U51109WB1998PLC087477),

...Corporate Debtor

Date of Hearing: 26.04.2022

Date of pronouncing the order: 29.04.2022

Coram:

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

Appearances (through Video Conferencing)

1. Mr. Subodh Kumar Agarwal, PCA } For Financial Creditor

1. Mr. Patita Paban Bishwal, Advocate } For Corporate Debtor

ORDER

Rajasekhar V.K., Member (Judicial)

1. The Court convened *via* video conference.

2. This is a Company Petition filed under section 7 of the Insolvency and Bankruptcy Code, 2016 ***('the Code')*** read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Drolia Agencies Private Limited ***('Financial Creditor')*** having its registered office at 7, B.B. Ganguly Street, 3rd Floor, Kolkata – 700012, by Mr. Bimal Kumar Drolia, Director, duly authorised *vide* board resolution dated 16 August, 2019 for initiation of Corporate Insolvency Resolution Process ***('CIRP')*** against H S Mercantile Limited ***('Corporate Debtor')*** having its registered office at 204, 208, Mahatma Gandhi Road, Kolkata – 700007.

3. The present Petition was filed on 04 October, 2019 before this Adjudicating Authority on the ground that the Corporate Debtor had defaulted in payment of a sum of Rs.90,39,250/- (Ninety Lakh Thirty Nine Thousand Two Hundred Fifty only) including interest @ 9% p.a. upto 31 March, 2019 (principal amount of Rs.50,00,000/- and interest amount of Rs.40,39,250/-). The date of default is stated to be ***04 April, 2016***.

4. It is submitted in the Petition, Part – II that the authorised share capital of the Corporate Debtor is Rs.75,00,000/- (Rupees Seventy Five Lakh only) with paid up Capital as Rs.64,70,000/- (Rupees Sixty Four Lakh Seventy Thousand only).

5. ***Submissions by the Ld. Sr. Counsel appearing on behalf of the Financial Creditor***

5.1 As per the arrangement between Subh Chintak Commotrade Private Limited and the Corporate Debtor, Subh Chintak Commotrade Private Limited had disbursed an Inter Corporate Loan ***('ICD')*** of Rs.50,00,000/- (Rupees Fifty Lakh only) to the Corporate Debtor on 07 November, 2009.[1] However, *vide* order dated 28 March, 2019 Subh Chintak Commotrade Private Limited was amalgamated with Drolia Agencies Private limited i.e., the Financial Creditor. The ICD was disbursed at an agreed rate of interet of 9% p.a. The interest amount was to be paid annually and the principal

[1] Annexure – 5 of the Petition.

amount was to be paid immediately upon being recalled. No interests were paid by the Corporate Debtor since 2010.

5.2 On failure of payment of interest by the Corporate Debtor, Subh Chintak Commotrade Private Limited decided to recall the ICD facility, as per the understanding between the parties. Subsequently, a notice dated 04 April, 2016 was sent under section 433/434 of the Companies Act, 1956 read with section 271 of the Companies Act.[2]

5.3 The Corporate Debtor in their letter dated 31 march, 2017 and 31 march, 2019 have confirmed the dues and outstanding payable by the Corporate Debtor to the Financial Creditor. The dues of the Corporate Debtor are admitted and unimpeachable. From time to time the Financial Creditor kept of pursuing the Corporate Debtor to pay the ICD

6. Submissions by the Ld. Authorised Representative appearing on behalf of the Corporate Debtor

6.1 The instant petition is aimed at arm twisting the Corporate Debtor to pay a non-existent debt which is unenforceable under law.

6.2 The Debt is time barred on the ground that the ICD was granted by the Subh Chintak Commotrade Private Limited in the year 2009 and the default was in the year 2010 for the First time. Therefore admittedly the right to apply accrued for the first time in the year 2010 but no application was made by the Applicant. Afterwards the Applicant has made an averment that a notice u/s 433/434 of companies Act, 1956 was issued on 04 April, 2016, prima facie which is beyond the period of limitation and it is settled law and has been held in catena of judgments that mere issuance of Legal Notice after the expiry of limitation will not rise to fresh limitation period. Moreover, no acknowledgement was made by the Corporate Debtor within the period of limitation.

6.3 Subh Chintak Commotrade Private Limited was in the trade of textile materials and has given advance to the Corporate Debtor in 2009 for supply of textile materials.

[2] Annexure – 9 of the Petition.

Invoices were also raised by the Corporate Debtor against the supply of such materials.[3] Since, there was a delay in supply of material by the Corporate Debtor, the dispute was settled against the supply of textile material on 01 April, 2016.[4]

6.4 No loan agreement, receipt, promissory note or any other documents in support of the alleged ICD has been filed by the Financial Creditor

6.5 The Financial Creditor has approached this Adjudicating Authority with unclean hands and mala fide intentions as no notice dated 04 April, 2016 under section 433/434 of companies Act, 1956 was ever sent to the Corporate Debtor and the said notice was sent to the Corporate Debtor on 07 May, 2016 which can be seen from a bare perusal of Annexure 9 filed along with present petition. It is submitted here that the notice under section 433/434 of companies Act, 1956 is backdated document.

7. Submissions by the Financial Creditor in their Supplementary Affidavit.

7.1 The Financial Creditor is a Non- Banking Financial Company

7.2 Further, TDS was deducted by the Corporate Debtor at the interest rate of 9% and the same is reflecting on 26AS, which forms a part of the Petition at page 55 -72. On many occasions confirmation of account for the Financial Year 2009-10, 2010-11, 2011-12, 2012-13, 2013-14, 2014-15, 2015-16, 2016-17 and 2017-18 was done by the Corporate Debtor.

7.3 Calculation of the loan amount including interest is same as the amount reflected in the Financial Statement of the Corporate Debtor for the year ending on 2016-17 i.e., Rs.74,82,590/- under the heading '*Long Term Borriwings*'[5]

Analysis and Findings

8. We have heard the Ld. Counsel appearing on behalf of the Financial Creditor and the Ld. Authroised Representative appearing on behalf of the Corporate Debtor.

9. Upon perusal it is apparent that there exists no documentation governing underlying arrangement between the parties, which leaves us unsatisfied regarding existence of

[3] Annexure – R-1 of the Reply.

[4] Annexure R-2 of the Reply.

[5] Annexure – 8 of the Petition.

financial relationship between the parties. The sole reliance has been placed on the TDS Certificate under section 298 of the Income Tax Act, which is not sufficient to conclude that the transaction in question is a *'Financial Debt'*.[6]

10. Further, the transaction in question pertains to the year 2009 i.e, 07 November, 2009 and the so-called acknowledgement as stated by the Financial Creditor, is of the Financial Year 2016 -2017, which is beyond the limitation period. It is also pertinent to mention that there has been no direct acknowledgment.

11. On failure of the Financial Creditor to satisfy this Adjudicating Authority of the existing debt and default by the Corporate Debtor, ***C.P (IB) No. 1781/KB/2019*** stands ***dismissed*****.** The Financial Creditor is, however, at liberty to pursue other available remedies under law.

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

13. Files be consigned to record.

BALRAJ JOSHI Digitally signed by BALRAJ JOSHI Date: 2022.04.29 20:17:57 +05'30'

Balraj Joshi
Member (Technical)

Rajasekhar V K Digitally signed by Rajasekhar V K Date: 2022.04.29 17:38:55 +05'30'

Rajasekhar V.K.
Member (Judicial)

Safura A., LRA

The Order is pronounced on 29th day of April, 2022

[6] Prayag Polytech Pvt. Ltd. Vs. Gem Batteries Pvt. Ltd. [Company Appeal(AT) (Insolvency) No. 713 of 2019] (Para 6)