

IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH, BENGALURU
(Exercising powers of Adjudicating Authority under
the Insolvency and Bankruptcy Code, 2016)

C.P. (IB) No.107/BB/2021
Under Section 7 of the IBC, 2016
r/w Rule 4 of the I&B (AAA) Rules, 2016

In the matter of:

M/s. Global Emerging Markets India Ltd.,
B-28, Pushpanjli Farms Bijwasan,
New Delhi - 110061 ... Petitioner/Financial Creditor

VERSUS

M/s. Lepakshi Heritage Wellness
Village Private Limited,
Sy. No. 35/2, 35/1 (Part) 1st Cross,
Ananthapura Village,
Singanayakanahalli, Yelahanka,
Bengaluru - 560064 ... Respondent/ Corporate Debtor

Order delivered on: 03rd June, 2022

Coram: 1. **Hon'ble Shri Ajay Kumar Vatsavayi, Member (Judicial)**
2. **Hon'ble Shri Manoj Kumar Dubey, Member (Technical)**

Present:

For the Petitioner : Shri Dhyan Chinnappa, Senior Counsel
Shri Rohan Kothari
For the Respondent : Shri R.V Yogesh

ORDER

Per: Ajay Kumar Vatsavayi, Member (Judicial)

1. The present petition is filed, under Section 7 of the Insolvency and Bankruptcy Code, (hereinafter referred to as 'IBC'/Code) 2016, read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by M/s. Global Emerging Markets India Limited (hereinafter referred to as 'Petitioner'), with a prayer to initiate Corporate Insolvency Resolution Process (CIRP) against M/s. Lepakshi Heritage Wellness Village Private Limited (hereinafter referred as 'Respondent'). The amount claimed to be in default is Rs. 25,84,94,000/- (Rupees Twenty Five Crore Eighty Four Lakh Ninety Four Thousand only).


2. It is stated that, Lepakshi Knowledge Hub Private Limited (**Project Proponent**) had entered into a Memorandum of Agreement with the Government of Andhra Pradesh on 22.12.2008 (MOA) for the purpose of setting up global knowledge hub. By way of this MOA, the Government of Andhra Pradesh agreed to allot and transfer required land to the Project Proponent. Further the Project Proponent incorporated two entities i.e., Lepakshi Science and Technology Park Private Limited (**Borrower**) and Lepakshi Heritage Wellness Village Private Limited (Corporate Debtor/Respondent) respectively.
3. On 19.03.2012 the Financial Creditor and the Borrower had executed an Inter Corporate Deposit ("**ICD**") agreement by which an amount of Rs. 5,00,00,000/- (Rupees Five Crores) was forwarded by the Financial Creditor to the **Borrower**, i.e., Lepakshi Science and Technology Park Private Limited. The ICD was executed in furtherance of Memorandum of Understanding dated 07.01.2012 that the Financial Creditor had entered into with Lepakshi Knowledge Hub Private Limited (**Project Proponent**).
4. It is stated that on 29.03.2012 the Corporate Debtor/ Respondent/ Guarantor had executed a corporate guarantee in favour of the Financial Creditor guaranteeing repayment of the amount transferred by the Financial Creditor to Lepakshi Science and Technology Park Private Limited (**Borrower**).
5. Finally the Financial Creditor was constrained to recall the ICD on 19.09.2020 when the Borrower failed to repay the ICD amount and when a notice was issued to the Project Proponent, Corporate Debtor and Borrower calling upon return of Rs. 5,00,00,000/- along with compound interest amounting to Rs. 17,97,00,000/-. On 07.10.2020 a joint response was received from the Project Proponent, Corporate Debtor and Borrower denying liability on unsustainable ground. Further, it is stated that the Borrower in its Balance Sheet filed with Ministry of Corporate Affairs for the financial year 2011-12 to 2018-19 admitted the liability towards the Financial Creditor.

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6. The Petitioner/Financial Creditor in support of the C.P. averments has enclosed the following documents among other documents to the C.P:
- i. Memorandum of Agreement dated 22.12.2008 between the Government of Andhra Pradesh and Lepakshi Knowledge Hub Private Limited
 - ii. Memorandum of Understanding dated 07.01.2012 between Financial Creditor and Lepakshi Knowledge Hub Private Limited
 - iii. Inter Corporate Deposit dated 19.03.2012 executed by the Financial creditor and Lepakshi Science and Technology Park Pvt. Ltd.
 - iv. Guarantee dated 29.03.2012 issued by the Corporate Debtor infavour of the Financial Creditor;
 - v. Escrow Agreement dated 16.04.2012 between the Financial Creditor, Lepakshi Knowledge Hub Private Limited the Project Proponent and Indusind Bank Limited
 - vi. Balance Sheet of Lepakshi Science and Technology Park Private Limited from the Financial years 2011-12 to 2018-19;
 - vii. Recall letter issued by the Financial Creditor to the Corporate Debtor, Project Proponent and Borrower dated 19.09.2020
 - viii. Verifying affidavit filed by the Financial Creditor
 - ix. Written Communication by the proposed Interim Resolution Professional in Form 2
 - x. Board Resolution dated 04.02.2020
 - xi. Record of Default with Information Utility (Form C)
 - xii. Copy of the Master Date of Corporate Debtor found on the MCA website.
 - xiii. Copy of the Financial Statements and other documents of the Corporate Debtor
7. The Corporate Debtor/Respondent opposed the Company Petition on various grounds, interalia, mainly contending as under:
- i. The instant petition is liable to be dismissed in limine as the Rs. 5 crore which forms the basis of instant proceedings is neither a financial debt in the first place as contemplated u/s 7 of IBC nor the Petitioner is Financial Creditor as contemplated under IBC. No amount is owed to the Petitioner and as such these proceedings are fundamentally malicious. The Petitioner, on its own default backed out from the MOU and the order of performance contemplated in the transaction was dishonoured by the Petitioner. The bouquet of transaction contemplated in the MOU can never come under the ambit of financial debt and moreover as the transaction failed due to Petitioner's own non-performance there can never be any default and as such no money is owed to the Petitioner.

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- ii. It is stated that the Petitioner's own balance sheets do not depict the 5 cr. as a debt, but as "Other investments (Group Companies)". Petitioner also did not depict any accrual of interest in the past 8 years. As such this belated litigation of the Petitioner is evidently malafide.
- iii. The Respondent also sufficiently explained as to how the entry towards Rs. 5 cr. subsisted on the balance sheets of LST and how any reference to the ICD *qua* the Rs. 5 cr., was also removed after FY 2016-17 and the Rs. 5 cr., subsisted as an 'other liability' as a balancing entry towards the cost of land transfer which was incurred as capital expenditure (occurring on the asset's side of the Respondent No.2 balance sheets). From FY 2016-17, the balance sheets do not contain any reference to the Petitioner. Infact, the Petitioner's own financial statements do not depict the Rs. 5 cr., as a debt, much less financial. No entries in this regard exist in the Petitioner's books. The Petitioner also failed to demonstrate any written acknowledgement of debt in 3 years prior to the instant section 7 proceedings making any reference to the alleged ICD in a manner that extends the time as provided under the Limitation Act. Therefore, apart from being baseless on merits any claim in this regard is also hopelessly barred under the law of limitation.
- iv. It is stated that the Petitioner's malicious invocation of Insolvency jurisdiction of this Ld. Tribunal, in the facts and circumstances of the present case, is a blatant abuse of legal process squarely attracting penalty u/s 65 of the IBC. The brazen manner in which the Petitioner deliberately concealed the catena of events and documents to avoid getting the matter dismissed at the threshold further demonstrates Petitioner's malicious motives. Petitioner did not even whisper about the plethora of ongoing litigation in its Section 7 petition.
- v. The IBC has been enacted with the objective to quickly resolve Insolvency situations. Courts have consistently deprecated invocation of insolvency jurisdiction as arm twisting measures, even under old regime. The Respondent humbly prays that the harshest of penalty should be imposed on the Petitioner u/s 65 so that unscrupulous litigants like the Petitioner do not abuse the Insolvency jurisdiction under IBC.

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8. Heard Shri Dhyan Chinnappa, Learned Senior Counsel a/w Shri Rohan Kothari, Learned Counsel for the Petitioner and Shri R.V. Yogesh, Learned Counsel for the Respondent and have also perused the pleadings carefully including the Written Submissions filed and Judgements relied on by both sides.
9. It is not in dispute that the Respondent/Corporate Debtor executed a corporate guarantee in favour of the Financial Creditor/Petitioner guaranteeing repayment of the amount paid by the Financial Creditor/Petitioner to the Principal Borrower i.e., Lepakshi Science and Technology Park Private Limited. In C.P (IB) No. 98/BB/2021 filed by the Financial Creditor/Petitioner against the Principal Borrower M/s. Lepakshi Science and Technology Park Private Limited, the Borrower has raised identical contentions and the said C.P (IB) No. 98/BB/2021 is disposed of by this Adjudicating Authority by a separate order passed today, wherein identical contentions were answered as under:

“14. The Hon’ble Supreme Court of India in M/s. Innoventive Industries Ltd. vs. ICICI Bank & Anr. in Civil Appeal Nos.8337-8338 of 2017 observed as under:

“27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of “debt”, we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a “claim” and for the meaning of “claim”, we have to go back to Section 3(6) which defines “claim” to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5 (21) means a claim in respect of provision of goods or services.

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28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor – it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in part III, particulars of the financial debt in part IV and documents, records and evidence of default in part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the “debt”, which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.”

15. Section 7(5)(a) of the Code is as follows:-

“5) Where the Adjudicating Authority is satisfied that-

(a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application.”

16. As per the enunciation of law by the Hon’ble Apex Court, in an Application under Section 7 of the IBC, 2016, what is required to be seen by this Adjudicating Authority, is whether the application filed within the period of limitation and whether the Petitioner/Financial Creditor proved the debt and default thereon.

17. It is the settled principle of law that the amount given under an Inter Corporate Deposit is a financial debt. The Learned Counsel appearing for the

Respondent/Corporate Debtor while not disputing the said principle, however, mainly contended that the subject Inter Corporate Deposit was given by the Petitioner/Financial Creditor to the Respondent/Corporate Debtor as a part of the investment made and hence it cannot be treated as a financial debt and the C.P should be dismissed. The Learned Counsel, in order to substantiate this submission drawn our attention to various Clauses of the Memorandum of Understanding dated 07.01.2012 executed between M/s. Lepakshi Knowledge Hub Private Limited and Global Emerging Markets India Limited i.e., the Petitioner/Financial Creditor in the instant C.P. Accordingly, it is submitted that the true nature of the transaction was to invest in the Respondent/Corporate Debtor Company, and to purchase the shareholding. Advancing the money through the Inter Corporate Deposit was also part of the said investment scheme.

18. On the otherhand, the Learned Senior Counsel appearing for the Petitioner submits that the Inter Corporate Deposit is an independent transaction and cannot be treated as part of any action or document in pursuance of the Memorandum of Understanding dated 07.01.2012 executed between the Petitioner and a third party.

19. We find force in the submissions made by the Learned Senior Counsel appearing for the Petitioner/Financial Creditor. The Memorandum of Understanding dated 07.01.2012, on which the Respondent placed reliance was admittedly executed between the Petitioner and a separate legal entity known as M/s. Lepakshi Knowledge Hub Private Limited. Further, the amount received by the Respondent/Corporate Debtor under the subject Inter Corporate Deposit dated 19.03.2012 was not for purchasing of any shares by the Petitioner in the Respondent Company. On the other hand, it was for meeting certain expenses by the Respondent/Corporate Debtor. Hence, the contention of the Petitioner in this regard is rejected. The other contention with regard to the pending Arbitration proceedings etc., have no relevance in the application u/s 7 of the IBC 2016. The contention of the Respondent/Corporate Debtor that the Petitioner/Financial Creditor in the Balance Sheets shown the subject amount as 'other investments' but not shown as Inter Corporate Deposit and hence the C.P is liable to be dismissed, is invalid and unsustainable, since the execution and transfer of money under the Inter Corporate Deposit was not in dispute.

20. The Petitioner/Financial Creditor is able to prove the debt and default by placing reliance on various documents enclosed to the instant company petition.

21. The other issue for consideration is whether the present application is filed within limitation. The subject, Inter Corporate Deposit was dated 19.03.2012 and tenure of the same was for the period of 6 (six) months and was interest free during the said term. It was further provided that if the Inter Corporate Deposit is not repaid within the said term, the Corporate Debtor undertakes to repay Rs. 5,00,00,0000/- (Rupees Five Crores only) along with



interest at the rate of 18% per annum to the Financial Creditor/Petitioner. As the Corporate Debtor admittedly not repaid the amount received under Inter Corporate Deposit within the specified period, the Financial Creditor/Petitioner recalled the Inter Corporate Deposit amount along with 18% interest from the Corporate Debtor/Respondent vide recall letter dated 19.09.2020. The instant C.P was filed on 13.10.2021. The Corporate Debtor/Respondent has acknowledged the receipt of Rs. 5,00,00,000/- (Rupees Five Crores only) from the Financial Creditors/Petitioners in its Balance Sheets from the Financial Years 2011-2012 to 2018-2019. Hence the C.P is well within the period of limitation.

22. The various decisions, on which the Learned Counsel for the Respondent/Corporate Debtor placed reliance, have no relevance to the facts of the present case.

23. The application filed in the prescribed Form No.1 is found to be complete.”

10. Since the debt and default against the Principal Borrower was already held to be proved and since the execution of the Corporate Guarantee by the Corporate Debtor and the invocation thereof was also proved, the instant C.P is also liable to be admitted.
11. It is relevant to state here that the Hon'ble NCLAT in the case of *State Bank of India vs. Athena Energy Ventures Private Limited, C.A (AT) (Ins) No. 633/2020* considered its earlier judgement in *Dr. Vishnu Kumar Agarwal vs. Piramal Enterprises Limited, C.A (AT) (Ins.) No. 346/2018* and after interpreting the law, held that the Financial Creditor can simultaneously or one after another initiate CIRP against the Corporate Debtor as well as Corporate Guarantor. Hence, there is no impediment in initiating CIRP against the Respondent herein, who is the Corporate Guarantor, even after initiating the CIRP against the Principal Borrower.
12. The instant application filed in the prescribed Form No.1 is found to be complete.
13. In the circumstances and for the aforesaid reasons and since the C.P. is complete, the same is **admitted** in terms of Section 7(5) of the IBC and accordingly, moratorium is declared in terms of Section 14 of the Code. As a necessary consequences of the moratorium in terms of Section 14, the following prohibitions are imposed, which must be followed by all and sundry:

- (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;
- (b) any court of law, tribunal, arbitration panel or other authority;
- (c) Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;
- (d) 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;
- (e) The recovery of any property by an owner or lessor, where such property is occupied by or in the possession of the Corporate Debtor;
- (f) It is further directed that the supply of essential goods or services to the Corporate Debtor as may be specified, shall not be terminated or suspended or interrupted during the moratorium period;
- (g) The provisions of Section 14(3) shall however, not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator and to a surety in a contract of guarantee to a Corporate Debtor;
- (h) The order of moratorium shall have effect from the date of this order till completion of the Corporate Insolvency Resolution Process or until this Bench approves the Resolution Plan under sub-section (1) of Section 31 or passed an order for liquidation of Corporate Debtor under Section 33 as the case may be;

14. In Part-III of Form No.1, Shri Hemendra Paliwal bearing Registration No. IBBI/IPA-001/IP/P-01830/2019-20/12788 has been proposed as Interim Resolution Professional (IRP). Form No.2 dated 29.06.2021 has been filed along with the C.P is found at Page Nos.297-298 of the Petition. The Law Research Associate of this Tribunal has checked the credentials of Shri Hemendra Paliwal, there is nothing adverse against him. In view of the above, we appoint **Shri Hemendra Paliwal** bearing Registration No. IBBI/IPA-001/IP/P-01830/2019-20/12788, having registered address at A-1901, Raheja Eternity, Thakur Village, Kandivali East, Mumbai - 400101, email- paliwal.hemendra@gmail.com, as the Interim Resolution

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Professional. The IRP is directed to take the steps as mandated under the IBC, specially under Sections 15, 17, 18, 20 and 21 of IBC, 2016.

15. The Interim Resolution Professional shall after collation of all the claims received against Corporate Debtor and the determination of the financial position of the Corporate Debtor constitute a Committee of Creditors and shall file a report, certifying constitution of the Committee to this Tribunal on or before the expiry of thirty days from the date of his appointment, and shall convene first meeting of the Committee within seven days for filing the report of Constitution of the Committee. The Interim Resolution Professional is further directed to send regular progress reports to this Tribunal every fortnight.
16. A copy of the order shall be communicated to both the parties. The learned Counsel for the Petitioner shall deliver copy of this order to the Interim Resolution Professional forthwith. The Registry is also directed to send the copy of this order to the Interim Resolution Professional at his e-mail address forthwith.

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**(MANOJ KUMAR DUBEY)
MEMBER (TECHNICAL)**

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**(AJAY KUMAR VATSAVAYI)
MEMBER (JUDICIAL)**