

IN THE NATIONAL COMPANY LAW TRIBUNAL

KOLKATA BENCH

KOLKATA

Coram: 1. Shri Madan B. Gosavi, Hon'ble Member (Judicial)
2. Shri Virendra Kumar Gupta, Hon'ble Member (Technical)

C.P. (IB) No. 1190/KB/2018

In the matter of:

An application to initiate Corporate Insolvency Resolution Process 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:

Contemporary Brokers Private Limited, having its registered office at 1, Old Court House Corner, 2nd Floor, Kolkata-700 001

... .. Financial Creditor

- Versus -

Pallorbund Tea Limited, having its registered office at Sri R N M House, 2nd Floor, 3B, Lalbazar, Kolkata-700 001.

... .. Petitioner/Corporate Debtor

Counsels on Record:

1. Mr. Ratnanko Banerji, Sr. Advocate)
2. Mr. Shaunak Mitra, Advocate)
3. Ms. Nandini Khaitan, Advocate) ... For Financial Creditor
4. Mr. Debdatta Chakraborty, Advocate)
5. Mr. Suryakesh Manot, Advocate)

1. Mr. Reetobroto Kr. Mitra Advocate)
2. Mr. Ayan Dutta, Advocate) ... For Corporate Debtor
3. Mr. Pradip Kr. Sarawagi, Advocate)

Date of Hearing : 23.09.2019

Date of Pronouncement of Order: 26 . 09. 2019

ORDER

Per Virendra Kumar Gupta, Member (T)

1. This petition has been filed under Section 7 of Insolvency and Bankruptcy Code, 2016 (in short "IBC, 2016") by Financial Creditor for initiation of Corporate Insolvency Resolution Process (in short "CIRP") against the Corporate Debtor as the Corporate Debtor has committed default in repayment of financial debt. The amount of default has been stated as Rs.71,44,475.67 (Rupees Seventy One Lakhs Forty Four Thousand Four Hundred Seventy Five and Sixty Seven Paise only) and the date of default has been stated as 13th August, 2018.

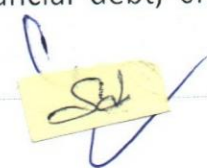
2. The facts, in brief, are that Financial Creditor and Corporate Debtor entered into a financial assistance agreement dated 26th February, 2015 (hereinafter referred to as "the agreement") whereby a sum of Rs. 100 Lakhs was to be disbursed and interest @ 14% per annum with monthly rest at reducing balance method was to be paid by the Corporate Debtor. The said amount had been paid and a cheque towards security was also issued by the Corporate Debtor. The Corporate Debtor also executed a promissory note dated 26th February, 2015. The amount of loan had to be repaid by 30th June, 2015. In case there was a deficiency / delay in repayment, the Corporate Debtor had to provide requisite quantity of tea which could be sold by the Financial Creditor, both in open auction as well as privately to recover the amount of financial assistance





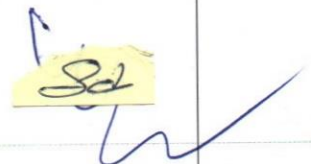
along with interest from the sale proceeds. Subsequently, due to financial crunch and other issues, Corporate Creditor failed to pay the amount of loan. On persuasion from Financial Creditor, Corporate Debtor vide its letter dated 17th December 2015 acknowledged and admitted that a sum of Rs. 66 lakhs was due and payable by Corporate Debtor to Financial Creditor. In the said letter, the Corporate Debtor undertook to pay the said sum by sending the stock from its tea garden to the Financial Creditor and the Financial Creditor, in the absence of any option, accepted this proposal of the Corporate Debtor. However, the fact remains that the outstanding amount remained unpaid due to various reasons and failure on the part of Corporate Debtor to provide the requisite quantities of tea stock. The cheque provided as security has also got dishonoured. Ultimately, the Financial Creditor has filed this petition.

3. The Ld. Counsel appearing on behalf of the Financial Creditor narrated these basic facts and drew our attention to pages 20 to 22, containing copy of the agreement dated 26th February, 2015 to establish its claim as Financial Creditor. The Ld. Counsel further drew our attention to the various correspondences made between the parties placed at pages 26 to 29 to show that the Corporate Debtor had accepted the fact of granting of loans in various tranches and acceptance of failure by the Corporate Debtor due to compelling circumstances. He thereafter drew our attention to page no.71 of the Paper Book containing copy of letter dated 21st December, 2016 written by Corporate Debtor stating that due to operational reasons tea estate did not perform well resulting into financial crunch and, therefore, interest on the advance given by the Financial Creditor was requested to be waived. The Ld. Counsel further contended that cheque of Rs. 3,50,000/- had been given but the same was dishonoured. Ld. Counsel for the Financial Creditor placed reliance on the decision of the Hon'ble Supreme Court in the case of Swiss Ribbons Private Limited & ors. -vs.- Union of India & ors., Order dated 25.01.2019 to contend that in case of financial debt, only two



conditions are to be looked into i.e., (i) there was a debt due and payable and (ii) a default in payment thereof, either fully or in part.

4. The Ld. Counsel for the Corporate Debtor vehemently argued that the nature of transaction was not of financial debt as the Financial Creditor was an agent / broker for selling the tea produced by the Corporate Debtor and thus, merely for this reason, the petition filed by the Financial Creditor was liable to be dismissed. He referred to page no.21 of the paper book to show that as per agreement dated 26th February, 2015, the Corporate Debtor intended to sell teas of its tea estate through the lenders and this being the basic purpose, the same was not a financial debt but an advance paid by the Financial Creditor for purchase of tea. He further contended that the tea was to be sold at a particular price, however, the Financial Creditor sold the same at much less price resulting into heavy loss to the Corporate Debtor. The Ld. Counsel thereafter contended that the Corporate Debtor had never written any letter on 10th February, 2015. It was further stated that letter dated 21st December, 2016 also had no enclosures nor such enclosures bear the signature of any authorized personnel of Corporate Debtor, hence, the same could not help the cause of the Financial Creditor. The Ld. Counsel thereafter referred to page no.15 of the reply affidavit to show that on 1st July, 2015 the Financial Creditor had acknowledged that tea was sold much below the expected prices and such mistake had been accepted by the Financial Creditor. The Ld. Counsel also referred to the various documents to show that the Financial Creditor was, in fact, a broker and charging brokerage against the sale of tea, hence, the transaction was not of a nature of financial debt. The Ld. Counsel for the Corporate Debtor also relied on the marketing standing order as applicable to tea companies and brokers to contend that a broker could not advance money to the tea purchaser and for this reason also the claim of the Financial Creditor was not maintainable.



5. The Ld. Counsel for the Financial Creditor, in the rejoinder, submitted that for section 7 petition, what was necessary, there should be a financial debt due and payable and there is a default in payment thereof. Although there could be some dispute as regards the quantum of amount to be paid, but for that reason, petition could not be held as non-maintainable. He further contended that as per section 5(8)(f) of the IBC, 2016, the transaction was of the nature of financial debt even if the claims of the Corporate Debtor that it was a case of an advance and not of a loan transaction were accepted. The Ld. Counsel for the Financial Creditor further relied on the decision of this Tribunal in the case of Alliance Broadband Services Pvt. Ltd. vs. Manthan Broadband Services Pvt. Ltd., in C.P. No. 1634/KB/2018, Order dated 18.09.2019 and drew our attention to paragraphs 12, 16 and 17 of the said order to contend that the transaction squarely fell within the definition of financial debt, hence petition was maintainable.

6. The Ld. Counsel for the Corporate Debtor contended that the decision of the Tribunal in case of Alliance Broadband Services Pvt. Ltd. vs. Manthan Broadband Services Pvt. Ltd. was distinguishable on fact and hence, not applicable.

7. We have considered the submissions made by both the sides and also perused the material on record.

8. It is noted that an agreement has been executed between both the parties on 26th February 2015. In the said agreement, Financial Creditor has been referred to as lender and Corporate Debtor has been referred to as borrower. In the preamble, it has been mentioned that the Corporate Debtor requested the lender to arrange for advance on interest which was to be adjusted against net proceeds of tea of the borrower sold by the lender. Based upon this requirement, the borrower had agreed to give Rs. One Crore on interest @ 14% per annum to

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be charged on monthly rest as per reducing balance method. Borrower has also undertaken to give minimum quantity of teas to the lender to be sold through them. It has also been provided that the quantity could be varied but the quantity should be sufficient to make up for aforesaid advance along with interest thereon. The borrower has also agreed to provide A/c. Payee cheque as security as well as a Promissory Note has also been executed by the duly authorized person. It has also been provided that the agreement would stand terminated immediately after the satisfaction of aforesaid advance amount along with interest thereon. The above facts make it amply clear that the money has been given as an advance on interest and, thus, it has got the element of time value of money implied therein. Merely because the repayment has been linked with the sale proceeds of tea produced by the Corporate Debtor, that by itself would not alter the basic character of the transaction. Further, a person can both be a financial creditor as well as operational creditor and it is a settled proposition that provisions of IBC, 2016 would be applied in accordance with respective nature of transactions i.e., in respect of a financial debt, provisions of section 7 will apply and in respect of transactions of the nature of operational debt, provisions of sections 8 & 9 shall apply. Based upon the analysis of this agreement as well as other materials on record, we are of the view that it is a case of the nature of financial debt meaning thereby that money has been disbursed against the consideration for time value of money.

9. Once the transaction is held of the nature of financial debt, the aspects which need to be examined as regards the maintainability of application filed under section 7 is that there should be a debt due and payable and a default has been committed either in full or in part in respect of repayment of such debt along with interest thereon. Further, in case of a financial debt, there remains no necessity to go into the aspect of pre-existence of dispute i.e., even if a financial

debt is disputed, a claim can be made under section 7 for CIRP of a corporate debtor.

10. The Ld. Counsel for the Financial Creditor has relied on the decision of this Tribunal in the case of Alliance Broadband Services Pvt. Ltd. vs. Manthan Broadband Services Pvt. Ltd., in C.P. No. 1634/KB/2018, Order dated 18.09.2019, wherein it has been held that section 5(8)(f) of the IBC, 2016 was applicable in respect of advance given for purchase of property as the same had commercial effect of borrowing. We consider it pertinent to state that clause 5(8)(f) is a residuary provision which may include transactions which are not otherwise stated in section 5(8) specifically, subject to the condition that such transactions should have element of time value of money in it. However, we have already held that transaction is covered under clause 5(8)(a) as money has been borrowed on interest, hence, there remains no occasion to apply the residuary provision as contained in section 5(8)(f) of the IBC, 2016.

11. As regards the aspect of statutory restriction imposed on the brokers to not to finance the tea producers under standing order issued by State government/other statutory authority, as the case may be, we hold that the same cannot be a limitation in admitting this petition for the reason that provisions of IBC, 2016 are of overriding nature and any inconsistent law or instrument therewith has to give way to IBC, 2016. Accordingly, this plea of the Corporate Debtor is also dismissed.

12. The petition filed by the Financial Creditor is otherwise complete. They have also proposed the name of the Interim Resolution Professional (in short, "IRP") who has also given his consent; hence, we accept such person to act as IRP.

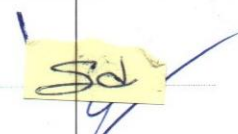
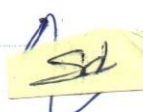
13. Having admitted the petition, we order as under:-

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ORDER

- i) The application filed by the Financial Creditor under section 7 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor, Pallorbund Tea Limited, is hereby admitted.
- ii) We declare a moratorium and cause public announcement in accordance with Sections 13 and 15 of the IBC, 2016.
- iii) Moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The IRP shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Section 15. The public announcement referred to in clause (b) of sub-section (1) of Section 15 of Insolvency & Bankruptcy Code, 2016 shall be made immediately.
- iv) Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:
 - 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 (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.
- v) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during moratorium period.
- vi) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- vii) The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.
- viii) Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of corporate debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.
- ix) Necessary public announcement as per Section 15 of the IBC, 2016 may be made.
- x) MR. ADITYA KUMAR TIBREWAL, IRP Registration No. IBBI/IPA-001/IP-P00743/2017-18/11249, E-mail: adityatibre@gmail.com

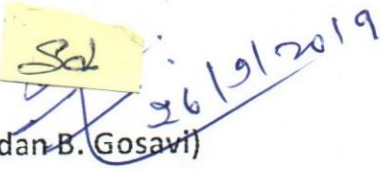





having office No. 7C, Kiran Shankar Roy Road, Hasting Chambers, Basement, Kolkata-700001, is appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan.

- xi) The Operational Creditor to pay sum of Rs. 50,000/- (Rupees Fifty Thousand Only) to IRP as advance fees as per Regulation 33(3) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation 2016 which shall be adjusted from final bill.
- xii) The Resolution Professional shall conduct CIRP in time bound manner as per Regulation 40A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016.
- Xiii) List the matter on 21/10/2019.....2019 for filing of the progress report.
- xiii) Registry is hereby directed under section 7(7) of the I. B. Code, 2016 to communicate the order to the Financial Creditor, the Corporate Debtor and to the I.R.P. by Speed Post as well as through e-mail.

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


(Madan B. Gosavi)
Member (Judicial)


(Virendra Kumar Gupta)
Member (Technical)

Signed on this, the 26th day of September, 2019.

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