

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH - II
KOLKATA**

C.P (IB) No. 1136/KB/2020

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:

Vikas Prakash Gupta, Resolution Professional of Man Tubinox Limited.

...Applicant

Versus

Basant Marketing Limited (CIN U32106WB1982PLC034865), a Company incorporated under the Companies Act, 1956 having its registered office at IMAX Lohia Square, Office No.4B, 4thFloor, Premises No.23, Gangadhar Babu Lane, Kolkata – 700012.

....Corporate Debtor

Date of Hearing: 17.02.2023

Date of pronouncing the order: 24 April, 2023

Coram:

Smt.Bidisha Banerjee : **Member (Judicial)**

Shri Balraj Joshi : **Member (Technical)**

Appearances (through Video Conferencing/hybrid mode)

For the Financial Creditor

1. Ms. Urmila Chakraborty, Adv.
2. Mr. Sandip Kumar Dutta, Adv.

ORDER

Per Bidisha Banerjee, Member (Judicial)

1. The Court convened *via* hybrid mode.
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 Vikas Prakash Gupta, Resolution Professional of Man Tubinox Limited (*Applicant*), for initiation of Corporate Insolvency Resolution Process (*CIRP*) against Basant Marketing Limited (*Corporate Debtor*).
3. The present Petition was filed on 14 August, 2020 before this Adjudicating Authority on the ground that there are trade receivables to the extent of Rs.27,83,20,000/- (Rupees Twenty Seven Crore Eighty Three Lakh Twenty Thousand only) from the the Corporate Debtor. Such trade receivables were generated by way of the issue of Bond by the Corporate Debtor to Man Tubinox Limited (*Financial Creditor*).
4. The total amount claimed to be in default by the Applicant on behalf of the Financial Creditor is Rs.27,83,20,000/- (Rupees Twenty Seven Crore Eighty Three Lakh Twenty Thousand only). Since the final notice was sent on 21 February, 2020 by the Applicant to the Corporate Debtor, the date of default is stated to be as on *21 February, 2020*.
5. It is submitted in the Petition, Part – II that the authorized share capital of the Corporate Debtor is Rs. 20,00,00,000/- (Rupees Twenty Crores only) with paid up Capital as Rs. 13,64,68,230/- (Rupees Thirteen Crore Sixty Four Lakh Sixty Eight Thousand Two Hundred Thirty only).

6. Submissions by the Ld. Counsel appearing on behalf of the Financial Creditor

6.1 The Financial Creditor is undergoing Corporate Insolvency Resolution Plan ('CIRP') as per the order dated 12 June, 2019 passed by this National Company Law Tribunal, Mumbai Bench and the Applicant is the Resolution Professional ('RP') of Financial Creditor. The Resolution Professional has in accordance with the requirement of the IBC, issued the notice and received the claims from the Creditors.

6.2 In the process of CIRP, the Resolution Professional observed that there are some receivables from the Corporate Debtor. Thereafter, the Resolution Professional of the Financial Creditor followed up with the Corporate Debtor to provide certain details about the debt with respect to these bonds but nothing has been done from the Corporate Debtor. Irrespective of regular follow up nothing came forward from the Corporate Debtor.

6.3 The Financial Creditor over a period of time had got various receivables by way of various entries in the books of accounts as receivable. According to the information available there was an opening balance as on 01 April, 2018 of Rs. 3,79,83,602/-. Additionally some receivables from Indigo Edutainment Private Limited to the extent of Rs.24,03,41,286/- was shifted to Basant Marketing Ltd. by way of Journal entries i.e., the Corporate Debtor

6.4 Further, out of the entire good receivable in the book Financial Creditor. of Rs.27,83,24,888/-, the Corporate Debtor issued a bond of Rs.27,83,20,000/- (Rupees Twenty Seven Crores Eighty Three Lacs Twenty Thousands Only). As per the explanatory statement to the notice calling Extra-Ordinary General Meeting, it was stated that [Annexure 5 at Page 31 of the Application]:

"It is noted that the company is unable to repay the amount to the unsecured creditors standing in the balance sheet for which it has been mutually agreed to issue them unsecured Optionally Convertible Zero Coupon Premium Bond (OZCPB) on the terms and condition as

agreed between them. The names of the parties and the number of OZCPB to be issued to them are mentioned under the above resolution.”

- 6.5 Further, on 22 March, 2019, meeting of Board of Directors were called for the purpose of issuing the bond and bond were issued with following resolution passed in the meeting:

RESOLVED THAT pursuant to the provisions of section 42 and 71 of Companies Act, 2013 read with Rule 14 of the Companies (Prospectus and allotment of securities) Rules 2014 including any statutory modification or re-enactments) thereof, for the time being in force and other applicable provisions if any, of the Companies Act, 2013, the consent of the Board of Directors of the company be and is hereby accorded to allot 39,832 (Thirty Nine Thousand Eight Hundred Thirty Two only) optionally convertible zero coupon premium bond (OZCPB) of Rs.10,000/- (Rs. Ten Thousands Only) each aggregating to Rs. 39,83,20,000/- (Rupees Thirty Nine Crores Eighty Three Lacs Twenty Thousands Only) to selected persons as stated herein below;

<i>Sl. No.</i>	<i>Name of the Proposed Investors</i>	<i>No. of OZCPB's</i>
<i>1.</i>	<i>Indramani Merchants Private Limited</i>	<i>4,000</i>
<i>2.</i>	<i>Man Industries (India) Limited</i>	<i>8,000</i>
<i>3.</i>	<i>Man Tubinox Limited</i>	<i>27,832</i>
	<i>Total</i>	<i>39,832</i>

Analysis and Findings

7. We have heard the Ld. Counsel appearing on behalf of the Financial Creditor. The matter was taken from time to time but none appeared for the Corporate Debtor. Hence, the Corporate Debtor has been set as *ex-parte*. On 19 December, 2022 the Registry was again directed to issue notice to the Corporate Debtor by speed post and to place the tracking information on record. However, the notice was returned.

8. Thereafter, on 23 January, 2023 the Ld. Counsel appearing for the Applicant submitted that the petition has been served on the Corporate Debtor and the Applicant shall file an affidavit of service. As per the Affidavit of Service the Applicant has served the copy of the Petition and the same has been received by the Corporate Debtor on 08 February, 2023. Further, an e-mail was also sent to the registered e-mail address of the Corporate Debtor on 06 February, 2023.
9. We have perused the records, the issues that arises are as follows;
- i. Whether unsecured Optionally Convertible Zero-Coupon Premium Bond (OZCPB) comes under the umbrella of the definition of Financial Debt as per the Code?
 - ii. Whether the Resolution Professional can file an application under section 7 or section 9 of the Code on behalf of a Corporate Debtor for initiation of CIRP against its own Debtor for the loan or service provided by the former Corporate Debtor to the latter?
10. As envisaged under Section 8 of the Code;
- “(8) “financial debt” means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes—*
- (a) money borrowed against the payment of interest;*
 - (b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;*
 - (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;*
 - (d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;*
 - (e) receivables sold or discounted other than any receivables sold on nonrecourse basis;*

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;”

[Emphasis Supplied]

- 11.** Hence, with respect to the first issue it is clear that term ‘financial debt’ includes any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument. And the Financial Creditor is the Creditor who owes any financial debts. Therefore, Bondholders are financial creditors under the Code.
- 12.** While coming to the second issues, Explanation II¹ of Section 11 of the Code has made it explicit that nothing prevents a Corporate Debtor undergoing a CIRP to

¹ 11. Persons not entitled to make application. - The following persons shall not be entitled to make an application to initiate corporate insolvency resolution process under this Chapter, namely: -

(a) a corporate debtor undergoing a corporate insolvency resolution process 4 [or a pre-packaged insolvency resolution process]; or

(aa) a financial creditor or an operational creditor of a corporate debtor undergoing a pre-packaged insolvency resolution process; or;

(b) a corporate debtor having completed corporate insolvency resolution process twelve months preceding the date of making of the application; or

(ba) a corporate debtor in respect of whom a resolution plan has been approved under Chapter III-A, twelve months preceding the date of making of the application; or

(c) a corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application under this Chapter; or

(d) a corporate debtor in respect of whom a liquidation order has been made.

Explanation [I]. - For the purposes of this section, a corporate debtor includes a corporate applicant in respect of such corporate debtor.

initiate a CIRP against its own Debtor for the loan or service provided by the former Corporate Debtor to the latter.

13. In light of the above facts and circumstances, it is, accordingly, hereby ordered as follows:-

- (a) The application bearing CP (IB) No. 1136/KB/2020 filed by Vikas Prakash Gupta, Resolution Professional of Man Tubinox Limited, under section 7 of the Code read with rule 4(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against Basant Marketing Limited, the Corporate Debtor, is ***admitted***.
- (b) There shall be a moratorium under section 14 of the IBC.
- (c) The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.
- (d) Public announcement of the CIRP shall be made immediately as specified under section 13 of the Code read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- (e) ***Mr. Piyush Kisanlal Jani*** registration number ***IBBI/IPA-001/IP-P01439/2018-2019/12164***, email: ***capiyushj@gmail.com***, is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the Code subject to submission of a valid Authorisation of Assignment in terms of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016. The fee payable

[Explanation II.- For the purposes of this section, it is hereby clarified that nothing in this section shall prevent a corporate debtor referred to in clauses (a) to (d) from initiating corporate insolvency resolution process against another corporate debtor.]

to IRP or the RP, as the case may be, shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the Code.

- (f) During the CIRP period, the management of the Corporate Debtor shall vest in the IRP or the RP, as the case may be, in terms of section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this Order, in default of which coercive steps will follow.
- (g) The IRP/RP shall submit to this Adjudicating Authority progress reports with regard to the progress of the CIRP in respect of the Corporate Debtor.
- (h) The Financial Creditor shall deposit a sum of **Rs.3,00,000/-** (Rupees Three Lakh only) with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC).
- (i) In terms of section 7(5)(a) of the Code, Court Officer of this Court is hereby directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the IRP by Speed Post and e-mail immediately, and in any case, not later than two days from the date of this Order.
- (j) Additionally, the Financial Creditor shall serve a copy of this Order on the IRP and on the Registrar of Companies, West Bengal, Kolkata by all available means for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this order.

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Vikas Prakash Gupta, Resolution Professional of Man Tubinox Limited v. Basant Marketing Limited

- 14.** *CP (IB) No. 1136/KB/2020* to come up on **19.05.2023** for filing the progress report.
- 15.** A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Bidisha Banerjee
Member (Judicial)

The Order is pronounced on 24th day of April, 2023

SA, LRA