BEFORE THE NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI BENCH

COURT- III

IB-805/ND/2020

Section: Under Section 7 of the Insolvency and Bankruptcy Code, 2016 and Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016.

IN THE MATTER OF

Mr. Raj Kumar Tyagi
S/o Sh. Hukam Chand
R/o House No. 162, Saddiq Nagar-2, Seva Nagar-2
Sihani Ghaziabad-201003 **...Financial Creditor**

Versus

KDP Buildwell Private Limited
Registered Address
A-213, Shant Global Chamber
Vikas Marg, Shakarpur
New Delhi-110092 **...Corporate Debtor**

Coram:

Shri Bachu Venkat Balaram Das Hon'ble Member (Judicial)

Shri Narender Kumar Bhola Hon'ble Member (Technical)

Delivered on: 21.12.2021

Appearances:

Financial Creditor : Mr. Ashok Juneja (Advocates)
Corporate Debtor :Mr. Satish Rai & Mr. Akhil Shankhwar (Advocates)

ORDER

Per: Narender Kumar Bhola, Member (Technical)

1. This is an application filed by the Financial Creditor namely, Mr. Raj Kumar Tyagi against the corporate debtor namely, KDP Buildwell Private Limited under section 7 of the IBC, 2016 read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) of the Corporate Debtor
2. The transaction leading to filing of application under consideration is as follows:
   a. It is the case of financial creditor that the Corporate Debtor under necessity and urgency of funds for its business purposes approached the Financial Creditor through its Director, Mr. Manoj Kumar Goyal for financial assistance for a short span of time and after various discussions with the Director of the Corporate Debtor, in the year 2015 the Financial Creditor disbursed an unsecured loan of Rs. 1,00,00,000/- (Rupees One Crore Only) on 25.02.2015 (hereinafter to be referred as "Loan") to the Corporate Debtor for an interest @ 18% per annum (double the interest rate of Fixed Deposit) from the date of disbursement till the actual date of realisation. The loan granted to the corporate debtor is to be paid on or before 25th February, 2017.

b. It is submitted that the said amount of unsecured loan was disbursed to the Corporate Debtor i.e., KDP Buildwell Private Limited (formerly known as MGI Buildwell Private Limited) through cheques bearing No. 024792 and 024742 both dated February 25, 2015 amounting to Rs. 50 Lakhs each aggregating to Rs. 1,00,00,000 (Rupee One Crore Only) drawn on Central Bank of India Sehani Branch, Meerut Road, Ghaziabad – 201003. It is stated that in the month of January, 2017 the Corporate Debtor handed over two cheques i.e., Cheques bearing No. 071794 dated 25.01.2017 for Rs. 50,00,000/- and a cheque bearing No. 071795 dated 25.01.2017 for Rs. 50,00,000/- aggregating to Rs. 1,00,00,000/- to the Financial Creditor both drawn on Central Bank of India, Sehani and further stated that corporate debtor informed to the financial creditor that the said cheque may be presented. However, the said cheques have been dishonoured with the reason "funds Insufficient" vide memo dated 23.03.2017.

c. It is further submitted that the legal notice dated 17.04.2017 was sent to corporate debtor for demanding the outstanding debt due to the corporate debtor and also to the directors of corporate debtor. It is stated that as on date of filing of captioned petition, the financial creditor has not received any payment from the corporate debtor, hence, prayed that the CIR Process of Corporate debtor may be initiated

3. The Corporate Debtor has also filed its reply and raised the question regarding the maintainability of the captioned petition. The corporate debtor submitted that the civil suits are pending before the civil court and Hon'ble High Court in order to show the conduct of the Financial Creditor. However, we do not deem appropriate to discuss the same in detail here as same is not relevant with respect to the captioned petition in our opinion and furthermore, the proceedings before the Adjudicating Authority under the IBC, 2016 are of summary nature and not of civil nature. Therefore, this adjudicating authority cannot take into consideration all the proceedings going on between the parties and their sister concern. As per section 7 of IBC, 2016, this Authority has to ascertain whether there is a default occurred or not?
4. The Financial Creditor has also filed the rejoinder and submitted that the cases mentioned by the corporate debtor in the reply are concerned to sister company of corporate debtor, which is separate legal entity. The financial creditor also filed the written submissions and reiterated all the facts and further submitted that the petition is not barred by limitation and it is maintainable. The applicant also relied on Hon'ble Supreme Court judgment namely, *Babulal Vardharji Gurjar V. Veer Gurjar Aluminium Industries Private Limited (civil appeal no. 6347 of 2019).* The Hon'ble Apex court has held that the period of limitation for an application seeking initiation of CIRP u/s 7 of the Code is governed by Article 137 of Limitation Act and is therefore,

three years from the date when the right to apply accrues. That the right to apply under the code accrues on the date when the default occurs and the default is that of actual non-payment by the corporate debtor when a debt has become due and payable.

5. The Financial Creditor has also relied upon the judgement of Hon'ble Supreme Court in the matter of Orator Marketing Pvt. Ltd. Vs. Samtex Desinz Pvt. Ltd. to drive home his point that in case of a petition under 7 of the Code, the transaction between the parties need not have any reference to interest to be paid for the amount of loan advanced. In this connection, relevant extracts from Paras 21 and 22 of the said Judgement are reproduced below:

> *"21……….Section 5(8) defines 'financial debt' to mean "a debt along with interest if any which is disbursed against the consideration of the time value of money and includes money borrowed against the payment of interest, as per Section 5(8) (a) of the IBC. The definition of 'financial debt' in Section 5(8) includes the components of sub-clauses (a) to (i) of the said Section.*
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> *22………… 'Financial debt' means outstanding principal due in respect of a loan and would also include interest thereon, if any interest were payable thereon. If there is no interest payable on the loan, only the outstanding principal would qualify as a financial debt. Both NCLAT and NCLT have failed to notice clause(f) of Section 5(8), in terms whereof 'financial debt' includes any amount raised under any other transaction, having the commercial effect of borrowing."*

6. The Corporate Debtor also filed the written submissions and raised the new objections (which were not raised at the time of filing of reply duly supported by affidavit) regarding maintainability of the captioned petition, stating that the

petition is barred by the limitation. Since, the objection raised by the corporate debtor are not supported by affidavit, therefore, we cannot consider these objections at this moment.

7. This Adjudicating Authority has perused the pleadings as well as heard the arguments advanced by the Financial Creditor and the corporate debtor. It is seen from the petition that the Corporate Debtor has admitted its liability towards Financial Creditor as it has issued the cheques in discharge of its liability and those cheques were dishonoured which clearly shows that there is default in payment and same is within the limitation as the Petition is filed by the petitioner within 3 years from the date of dishonour of Cheque i.e., date of default. The evidence placed by the financial creditor is sufficient to establish the existence of debt as well as default in payment on the part of the Corporate Debtor. The Hon'ble Apex Court has clearly stated in *Innoventive Industries (Innoventive Industries Ltd. v. ICICI Bank, (2018) 1 SCC 407))* that the moment it is established that there is a default in payment of financial debt by the corporate debtor, which is due and payable and the application is complete and no disciplinary proceedings is pending against the proposed RP then the adjudicating authority has no option but to admit the application. The Financial Creditor has fulfilled all the requirements of law. Accordingly, this Adjudicating Authority is inclined to admit this application and initiate the process of CIRP of the Corporate Debtor. The financial

Creditor has also proposed the name of the Resolution Professional for appointment of IRP.

8. Mr. Rajiv Rattan Regn. No.-IBBI/IPA-001/IP-P00901/2017-18/11501 (Email ID: carajivrattan@gmail.com) is hereby appointed as IRP as has been proposed by the Financial Creditor. There is no disciplinary proceeding pending against the IRP as evident from the Form-2 dated 05.02.2020. The IRP is directed to take charge of the Respondent Corporate Debtor's management immediately. He is also directed to cause public announcement under section 15 of the IBC, 2016, within three days from date of receiving the copy of this order and call for submissions of claim in the manner as prescribed.

9. The moratorium is declared which shall have effect from the date of this order till the completion of CIRP, for the purposes referred to in section 14 of the IBC, 2016. It is 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's 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 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.

10. The supply of essential goods or services of the Corporate Debtor shall not be terminated, suspended or interrupted during moratorium period. The provisions of sub-section (1) of section 14 of IBC, 2016 shall not apply to such transactions, as notified by the Central Government.

11. The IRP shall comply with the provisions of Sections 13(2), 15, 17 and 18 of the code. The Directors of the Corporate Debtor, its promoters or any person associated with the management of the Corporate Debtor shall extend all assistance and cooperation to the IRP as stipulated under section 19 for discharging his function under section 20 of the IBC, 2016.

12. The financial Creditor is directed to send the copy of this order to the IRP with immediate effect, so that he could take charge of the Corporate Debtor's assets etc., and make compliance with this order as per the provisions of IBC, 2016.

13. The financial Creditor is directed to communicate this Order to the IRP and the Corporate Debtor with immediate effect.

14. The Registry is directed to send a copy of this order to the Registrar of Companies concerned for updating the status of

Corporate Debtor on the MCA-21 site of Ministry of Corporate Affairs for information of all concerned.

15. The order is pronounced by this Adjudicating Authority through Virtual Hearing.

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(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)

(NARENDER KUMAR BHOLA)
MEMBER (TECHNICAL