

IN THE NATIONAL COMPANY LAW TRIBUNAL,

KOLKATA BENCH,

KOLKATA

C.P (IB) No.1432/KB/2019

In the matter of

An application 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:

Agarwal Polysacks Limited, a Public Non-Government Company Limited, registered under the provisions of the Companies Act, 1956 bearing CIN: **U25202RJ1992PLC006474** and having its registered office at E-649, M.I.A. IInd Phase, Bansi Jodhpur-342005, Rajasthan.

... Financial Creditor

Versus

In the matter of:

Karuna Distributors Private Limited , CIN **U51109WB2005PTC102416**, a company registered under the Provisions of Companies Act, 1956, having its Registered Office at 7, Prafulla Sarkar Street,3rd Floor, Room No. 4, Kolkata-700072,West Bengal.

...Corporate Debtor

Date of hearing : 26/10/2021

Order Pronounced on :03/11/2021

Coram:

Mr. Rohit Kapoor, Member (Judicial)

Mr. Harish Chander Suri, Member (Technical)

Counsels appeared through Video Conference

1. Mr. Shaunak Mitra, Adv. } For the Financial Creditor
2. Mr. Saurav Jain, Adv.

1. Mr. Rachit Lakhmani ,Adv. } For the Corporate Deb tor

2. Mr. Naman Maheshwari, Adv.

ORDER

Per: Harish Chander Suri, Member (Technical)

1. The Court is convened by video conference today.
2. This 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 has been filed by **Agarwal Polysacks Limited CIN: U25202RJ1992PLC006474**, a corporate entity, having its registered office at E-649, M.I.A. IInd Phase, Bansi Jodhpur-342005, Rajasthan, through Ms. Manju Agarwal, its Director duly authorised vide Board Resolution dated 1st August, 2019 (hereinafter referred as the Financial Creditors) is seeking initiation of corporate insolvency resolution process in respect of **Karuna Distributors Private Limited , CIN U51109WB2005PTC102416**, another corporate entity, having its Registered Office at 7, Prafulla Sarkar Street, 3rd Floor, Room No. 4, Kolkata-700072, West Bengal (hereinafter referred as the Corporate Debtor).
3. The Financial Creditor proposed the name of **Mr. Jitendra Lohia**, to act as an IRP having Registration No. **IBBI/IPA-001/IP-P00170/2017-18/10339**, who has consented vide his affidavit and Form-2 and submitted that he has agreed to accept the appointment as IRP if an order admitting the present application is passed by this Adjudicating Authority. He has further submitted that no disciplinary proceedings are pending against him with the Board or Institute of Insolvency Professionals of ICAI.
4. It is submitted that Corporate Debtor owes a sum of Rs.1,73,69,830/- (Rs.One Crore Seventy Three Lakh Sixty Nine Thousand Eight Hundred

Thirty Only), part of the financial debt granted by the Financial Creditor to the Corporate Debtor. It is submitted that this amount includes principal amount of Rs.1,67,00,000/- (Rs. One Crore Sixty Seven Lakh only) and interest till 31st July 2019 amounting to Rs.6,69,830/- (Rs. Six Lakh Sixty-Nine Thousand only). As regards the date of default, the Financial Creditor has submitted that the dates of default along with workings for computation of amount and days of default in tabular form has been annexed as 'Annexure-I, Exhibit B', Page-16 of the application. It reflects the computation amount and days of default, Exhibit-B, reflects the principal loan amounts/ debt granted on various dates starting from 12th July 2017 till 30th March, 2019. It is stated that the amount of Rs.1,67,00,000/- fell due on 17th June 2019, on which interest @ 12% for a period of 122 days comes to Rs.6,69,830/- and its total up to 1,73,69,830/- which is the amount due to the Financial Creditor from the Corporate Debtor. It is submitted that financial debt is unsecured. The Financial Creditor has enclosed the extracts of Bank Statements evidencing the loan granted to the Corporate Debtor, as Annexure-I, Exhibit.C (Pages 17 to 30).

5. It is submitted that the Financial Creditor had sent emails to the Corporate Debtor along with confirmation of account evidencing that the loan/inter corporate deposit was confirmed by the Corporate Debtor which is Annexure-I, Ext.D (Pages 31 to 33) and vide return email dated 15th April, 2019, the Corporate Debtor confirmed the statement of accounts from 1st April, 2018 to 31st March, 2019, as on 1st April, 2019. This confirmation of accounts (page 33) reflects interest on unsecured loan to the tune of Rs.25,88,384/- and deduction of TDS on interest to the tune of Rs.2,58,838/-. It is submitted that the said amount of TDS has also been deposited as reflected in Form 26 AS 'Annexure-I; Exhibit F' (Page-36) for the Financial Year 2018-19, to the credit of the Financial Creditor. Similarly, a sum of Rs.1,69,197/- was deducted and deposited as TDS for the Financial year 2017-18 to the credit of the assessee i.e.

the financial Creditor. The Financial Creditor has also enclosed a certificate dated 7th August, 2019 issued by its Chartered Accountant certifying that a sum of Rs.1,73,69,830/-(inclusive of interest) is due and payable by the Corporate Debtor to the Financial Creditor.

6. It is stated that vide letter of demand issued by the Financial Creditor to the Corporate Debtor dated 17th April, 2019, the Financial Creditor recalled the outstanding amount within two months from the date of this letter, i.e. by 17th June, 2019.
7. In reply affidavit filed by the Corporate Debtor through Mr. Umashankar Jhawar, its representative authorised vide Board Resolution dated 14.12.2019 (Ext. A to the Reply) submitted that the application is not maintainable and that there is no financial contract or agreement for charging interest on the amount has been produced by the Financial Creditor. It is also submitted that no evidence has been placed on record to show that the money was transferred to the Corporate Debtor against time value of money and thus the claim made by the applicant is not maintainable under section 7 of the I & B Code.
8. It is submitted that section 5(8) of the Code, includes the following:-
 - “ 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 the acceptance under any acceptance credit facility or its dematerialized 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 non-recourse 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.”

9. It is submitted that the Financial Creditor has placed nothing on record to show that the money so disbursed by it to the Corporate Debtor was against the consideration for the time value of money which is one of the most essential ingredients of financial debt. It is submitted that the Financial Debt has not placed a single document on record to show that there existed a transaction of unsecured loan and that the loan was repayable on demand. It is stated that the Financial Creditor has suppressed material facts and has also pleaded incorrect facts before this Adjudicating Authority.
10. It is submitted that the Financial Creditor is not authorised or exempted under section 186 of the Companies Act, 2013 to provide an unsecured loan. The Financial Creditor has not produced any licence or certificate to that effect entitling it to give unsecured loan and that the Financial Creditor is not in the business of providing loans. It is stated that the Financial Creditor is involved in business of manufacturing of **plastic products** as is apparent from the appellant of Article of association and memorandum of association and its audit report.
11. It is stated that there is no record of default furnished with the information utility by the Financial Creditor in regard to the Corporate Debtor and on this count alone, this application is liable to be dismissed.
12. The Corporate Debtor further submits that the Financial Creditor has suppressed the agreement to sell dated 25th January, 2017 executed by

Mr. Anshul Ramesh Agarwal, and Respondent Company, K.K.Agro Foods and Storage Limited and Samdari Strips Private Limited and Applicant as (Purchasers) for purchase of land situated at Khasra No. 667, village Shikarpura, Tehsil Luni, District Jodhpur, Rajasthan admeasuring a total Rakba 30 Bigha 9 Biswa 11 Biswanshi for an amount of Rs. 4,00,00,000/- for which an amount of Rs.5,00,000/- is advanced in cash as an earnest money. Copy of Agreement to sell dated 25.01.2017 is enclosed herewith and marked as Exhibit C. Hence, the present Application being devoid of merits deserves to be dismissed with exemplary costs.

13. It is stated that the amount claimed by the Financial Creditor was invested in the aforesaid purchase of land as mutually agreed by the Financial Creditor and the Respondent and the 3rd entity.
14. In the rejoinder however, the Financial Creditor reiterated the facts stated in the application and disputed and denied the averments made in the reply. It is denied by the Financial Creditor that the Corporate Debtor has not committed any default. It is stated that the amount claimed by the Financial Creditor has been duly acknowledged by the corporate debtor as is proved from the documents and annexures with the petition.
15. It is submitted by the Financial Creditor that the “default” under section 3 (12) of the IBC, 2016 states **“non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be”** and that the definition of the “debt” as mentioned in section 3(11) of IBC,2016 means **“a liability or obligation in respect of a claim which is due from any person and includes a financial debt or operational debt.”**

16. It is submitted that Corporate Debtor has defaulted in making the payment of loan and interest amount.
17. It is submitted that as per section 186 of the Companies Act, 2013, inter corporate deposit or loans are prohibited to a company when the same were granted **“exceeding 60% of its paid up Share Capital, free reserves and securities premium account or 100% of its free reserves and securities premium account whichever is more”**.
18. It is submitted that nothing has been placed on record by the Corporate Debtor to prove that inter corporate loan granted by the Financial Creditor to the Corporate Debtor existed above said limit. It is submitted that the audited financial statements of the Financial Creditor annexed by the Corporate Debtor itself along with the reply affidavit on page 81 reveal that the inter corporate loan granted by the Financial Creditor to the Corporate Debtor was within the said limit as mentioned in section 186 of the Companies Act, 2013. As such it does not violate section 186 of the Companies Act, 2013 or any other provisions of law.
19. The Financial Creditor has submitted that a fabricated story of the Corporate Debtor can be clearly seen through the bank statements where the corporate debtor has started making repayment of loan in several tranches in the financial year 2018-2019.
20. It is submitted that the Corporate Debtor has not adduced a single document where the applicant has signed or admitted the amount paid towards the agricultural land or has given any amount for purchase of agricultural land. It is submitted that the Corporate Debtor is unable to produce any document which proves this contents.
21. During the course of arguments, it is submitted by the Ld. Counsel for the Financial Creditor that the Corporate Debtor owes Rs.1,73,69,830/- to the Financial Creditor and the date of default is 17.06.2019 as the

Corporate Debtor defaulted in making payment of financial debt when the Financial Creditor had issued demand notice dated 17.04.2019 for repayment of financial debt before 17.06.2019 but the Corporate Debtor failed to repay the financial debt. It is submitted that the unsecured loan of Rs.2,42,00,000/- had been granted to the Corporate Debtor in several tranches starting from 12.07.2017 to 30.03.2019 @ 12% per annum interest and that the Corporate Debtor had made part payment of Rs.75,00,000/- and also paid interest @ 12% per annum but the Corporate Debtor had defaulted in making payment of Rs.1,67,00,000/- along with interest @ 12% per annum.

22. It is further submitted that the Corporate Debtor has deducted TDS on interest amount and deposited the same also from time to time. It is further argued that the Corporate Debtor has acknowledged the outstanding principal amount along with the interest due vide its email dated 15th April, 2019 by sending the confirmation of the accounts through their aforesaid email dated 15th April 2019. Ld. Counsel for the Financial Creditor has submitted that the Ledger of the Corporate Debtor in the books of the Financial Creditor along with certificate received from Chartered Accountant certifying that a sum of Rs. 1,73,69,830/- is due and payable as on 31.07.2019 supported by demand letter dated 17th April, 2019 sent by the applicant go to show that this is a fit case for admission.
23. To rebut the contention of the Corporate Debtor that the amount claimed by the Financial Creditor is not a financial debt because no agreement existed for charging interest and there is no time value of money, it is submitted that the Corporate Debtor had acknowledged the confirmation of accounts of unsecured loan through email dated 15th April, 2019 and the loan was given @ 12% per annum which is visible from the TDS deducted by the Corporate Debtor under section 194A of the Income Tax Act, 1961 on the interest loan paid to the applicant. The Corporate Debtor has paid interest till 31st March, 2019 so no question

of time value of money arises.

24. It is submitted that the Corporate Debtor has made a concocted story by fabricating the documents stated in their reply affidavit that the amount was taken from the Financial Creditor to purchase the land situated at Jodhpur, Rajasthan and accordingly the agreement for sale dated 25.01.2017 was entered into between the parties. The Financial Creditor, has however, completely denied that it has even entered into any agreement with the Corporate Debtor and others with regard to purchase of the agricultural land. It is stated that the act and conduct of the Corporate Debtor amounts to using, giving or fabricating false evidence in a judicial proceeding with a sole intention to run away from the liabilities. Unless and until the Corporate Debtor produces any documents with the signatures of the authorised person of the Financial Creditor, no reliance can be placed on this plea raised by the Corporate Debtor.
25. During the course of arguments, however, the Ld. Counsel for the Corporate Debtor specifically and candidly submitted that he is not relying on any of the agreements relating to the land and annexed by the Corporate Debtor with its reply affidavit. So, there is no question of dealing with these issues any further.
26. Ld. Counsel for the Financial Creditor has referred to and relied upon the judgement of the Hon'ble NCLAT, New Delhi in the matter of Narendra Kumar Agarwal -vs- Monotrone Leasing Private Limited another passed in Company Appeal Company Appeal (AT) (Insolvency) No. 549/2020 dated 19th January, 2021.
27. We have heard Ld. Counsel appearing for both sides and find that the disbursement and receipt of the money has not been disputed by the Corporate Debtor. It is also admitted that interest component on which TDS was deducted and paid by the Corporate Debtor to the credit of the Financial Creditor, and that the amount of TDS matches with the figures

shown in the reconciliation statement. This is a categorical admission on the part of the Corporate Debtor. In the previous year also similar deduction of TDS out of the interest payment was made and deposited by the Corporate Debtor. The Corporate Debtor has not even denied in its reply affidavit, the factum of confirmation of the debt and deduction from TDS interest and depositing the same with the authority concerned to the credit of the Financial Creditor. There is no explanation given by the Corporate Debtor as to why they deducted and deposited the TDS or issued the confirmation of the accounts. Even during the course of arguments, the Ld. Counsel for the Corporate Debtor has specifically admitted that it is a loan from the Financial Creditor. The defence taken by the Corporate Debtor in the pleadings actually has no legs to stand.

28. The default is writ large in this matter, the debt outstanding has not been paid in spite of demand notice issued by the Financial Creditor recalling the loan.
29. Under these circumstances, after hearing Ld. Counsel for the parties and after going through the documents placed on record by the parties, we are fully satisfied that this is a fit case for admission and initiation of corporate insolvency resolution process against Corporate Debtor.
30. In view of the observations and directions, we hereby admit the petition and pass the following Orders:-

ORDERS

- 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 is hereby **admitted**.
- ii) We hereby declare a moratorium and public announcement in accordance with Sections 13 and 15 of the I & B Code, 2016.

- iii) Moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The I.R.P. 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 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.
- v) The supply of essential goods or services rendered to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during the 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 the 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) **Mr. Jitendra Lohia, registered** with Insolvency and Bankruptcy Board of India, having Registration No. **IBBI/IPA-001/IP- P00170/2017-18/10339, Email jitulohia@knjainco.com** is hereby appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan subject to production of written consent within one week from the date of receipt of this order.
- x) The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors and shall identify the prospective Resolution Applicant within 105 days from the insolvency commencement date.
- xi) The Financial Creditor/Applicant is directed to deposit **Rs.2,00,000/- (Rupees Two Lac only)** with the IRP appointed hereinabove within **three** days from this order. IRP can claim the

preliminary expenses and fees subject to the approval by the CoC and after constitution of CoC.

- xii) Registry is hereby directed to communicate the order to the Operational Creditor, the Corporate Debtor, the I.R.P. and the jurisdictional Registrar of Companies by Speed Post as well as through email.
- xiii) List the matter on 12/01/2022 for the filing of the progress report.
- xiv) Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

(Harish Chander Suri)
Member (Technical)

(Rohit Kapoor)
Member (Judicial)

Order signed on, this 3rd day of November, 2021

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