



NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT-II)

Company Petition No. (IB)-95(ND)/2021

IN THE MATTER OF:

1. RN Khemka Enterprises Private Limited

Room No. PVT No. 9,
Plot No-51, KH. No. 355/3
Ground Floor, G.T.K. Road,
BLK-C Mehendru Enclave,
Delhi – 110033

... Petitioner No. 1/Financial Creditor

2. Satsai Finlease Private Limited

109, Wing-1, Hans Bhawan, 1
Bahadur Shah Zafar Marg,
New Delhi - 110002

... Petitioner No. 2/Financial Creditor

VERSUS

Persuasive Realcon Private Limited

Registered office at:
11-A, Hans Vihar Apartments,
Sector-13, Rohini, Delhi – 110095

... Respondent

Section: 7 of IBC, 2016

Order Delivered on: 04.07.2023

CORAM

SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)

SH. L. N. GUPTA, HON'BLE MEMBER (T)

PRESENT:

For the Applicant : Adv. Rakesh Wadhwa, Adv. Manish Jain,

For the Respondent : Adv. Siddharth Goswami



ORDER

PER: SH. ASHOK KUMAR BHARDWAJ, MEMBER (J)

R N Khemka Enterprises Private Limited & Anr. (for brevity, the Applicants/**Financial Creditors**) have preferred the captioned petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity, the **IBC, 2016**) read with Rule 4 of the Insolvency and Bankruptcy (Petition to Adjudicating Authority) Rules, 2016 with a prayer to initiate the Corporate Insolvency Resolution Process against M/s Persuasive Realcon Private Limited (the **Respondent**).

2. The Respondent namely, M/s Persuasive Realcon Private Limited is a Company incorporated on 10.09.2013 with CIN U70109DL2013 PTC257541 under the provisions of the Companies Act, 2013 having its registered office at 11-A, Hans Vihar Apartments, Sector-13, Rohini, Delhi – 110095, which is within the jurisdiction of this Tribunal. The Authorized Share Capital of the Respondent Company is Rs.1,00,000/- and its Paid-up Share Capital is Rs.1,00,000/- as per Master Data.

3. According to the Applicants, they are engaged in the business of financing and related activities whereas the Respondent is engaged, inter alia, in the business of printing and publishing.

3.1 In acceptance of the request made by the CD, the Applicants had given a total amount of Rs.2,03,55,358/- as an unsecured loan payable on demand



via bank transfer made in the year 2017 in various tranches to the CD. The Respondent booked the interest on the aforementioned amount of loan on a yearly basis, after deduction of TDS but it failed to make the payment of the said principal amount along with interest due and payable to the Applicants even after many reminders. For non-payment of the amount of debt with interest, the reason espoused by the Respondent was financial constraint and crunch.

3.2 Even after several oral reminders and requests made by the Applicants for payment of the outstanding amount, there was no positive response from the Respondent. The Applicants herein are promoted and managed by a common director Mr. Ankit Bhageria.

3.3 In the wake, the Applicants have preferred the captioned application under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of Insolvency and Bankruptcy (Petition to Adjudicating Authority) Rules, 2016, pleading for initiation of corporate insolvency resolution process against the Respondent. The Applicants being sister concerns and having common management, authorized Mr. Ankit Bhageria, Director through board resolution dated 27th January, 2021 to file the captioned application on their behalf. The deduction of TDS on the due interest amount payable by the Respondent is evident from the FORM-26AS (TDS Statements). According to the Applicants, the facts involved in the present application are similar to those involved in *Vijay Rochiani vs. Shantai Exim Limited* in which the Mumbai Bench of this Tribunal passed an order dated 14.01.2019. In the said case, the Mumbai Bench Tribunal accepted the application under Section 7



by placing reliance on the judgment of Hon'ble NCLAT in case of Nikhil Mehta and Sons vs. AMR Infrastructure (judgment dated 21.07.2017) whereby it was specifically laid down that, once a party deducts TDS under Income Tax Act, 1961 qua the amount of interest on the admitted repayments due, the amount of loan advanced by the Financial Creditor qualifies to be a financial debt. The Hon'ble NCLAT admitted the said petition and overturned the decision of this Adjudicating Authority.

4. The particulars of the total unpaid dues and the date of default are mentioned in Column II of Part IV of the petition, reads thus:

2.	Amount claimed to be in default and the date on which the default occurred (attach the workings for computation of amount and days of default in tabular form)	Total Debt: Rs. 2,03,55,358/- (Rupees Two Crore Three Lakh Fifty-Five Thousand Three Hundred Fifty-Eight) Disbursement Details:		
		Name of Creditor	Date	Amount (Rs.)
		R N Khemka Enterprises Private Limited	Opening Balance (01.04.2016)	8,375
			27.03.2017	50,00,000
			28.03.2017	85,00,000
			Less: Amount received 28.04.2017	(20,00,000)
			Less: Int. Amount received for 2016-17 on 04.09.2017	(13,093)
			Int. for 2017-18 and 2018-19	20,97,863
			Less: TDS	(2,09,787)
		(A)	1,33,83,358	
Satsai Finlease Private Limited	29.03.2017	60,00,000		
	Less: Int. received for 2016-17 on 04.09.2017	(13,315)		



		Int. for 2017-18 and 2018- 19	10,94,795
		Less: TDS	1,09,480
		(B)	69,72,000
		Total Amount (A+B)	Rs. 2,03,55,358
	<p>Total amount claimed in default inclusive of interest amount is Rs. 2,03,55,358/- (Rupees Two Crores Three Lakh Fifty-Five Thousand Three Hundred Fifty-Eight) given by Financial Creditor(s) as an unsecured loan as in the financial year 2017.</p> <p>For the workings and computation of the amount in default and the date of default, we herewith are attaching Ledger Accounts of the Corporate Debtor in the books of the Financial Creditor(s) are annexed herewith and marked as Annexure-5 (colly).</p>		

5. From the perusal of the Part IV of the Application, it is observed that the Applicant has claimed Rs.2,03,55,358/- as the amount of default.

6. The Applicant has relied upon the following documents to prove the existence of financial debt.

- i) Copy of Board Resolutions authorizing Mr. Ankit Bhageria to file the present petition.
- ii) Copy of Ledger Accounts of the Respondent in the books of the Applicants.
- iii) Copy of Bank Statements of the Applicant.
- iv) Copy of Form 26 AS for each year.



- v) Copy of latest Audited Balance Sheet of Applicants for the financial year ended 31.03.2020.
- vi) Copy of Balance Sheet of the Respondent.

7. Relying upon the aforesaid documents, the Applicant has prayed for initiation of CIRP against the Respondent.

8. On issuance of notice to it, the Respondent filed its reply to the Application and denied the claims made by the Applicants. According to Respondent, the Applicant had no cause of action to prefer the present application against it. According to Respondent, the Applicant No.1 is a Private Limited Company, duly incorporated under the erstwhile Companies Act 1956, got itself engaged in the business of financing without registration, thus contravening the provisions of the Reserve Bank of India Act, 1934. It is the case of the Respondent that a non-banking financial company (NBFC) is not allowed to carry on business without being registered with RBI.

9. As has been contended by the Respondent/CD, in terms of the provisions of Section 45 IA of the Reserve Bank of India Act, 1934, no NBFC shall commence or carry on the business of a non-banking financial institution (NBFI) without obtaining Certificate of Registration (CoR) from the Reserve Bank of India. Business activities to be carried on by such NBFCs need to be in terms of the provisions of Section 45 I(c) of the RBI Act, 1934. The Reserve Bank of India may take appropriate action against any person (NBFC) for contravening the provisions of RBI Act, 1934 and the Directions issued there under. In view of the submissions made by the Respondent, the



Applicant No.1 has misrepresented itself as NBFC, while it is engaged in brokerage service.

10. The plea espoused by the Respondent qua Applicant No. 2 is that the Applicants disbursed the first tranche of unsecured loan amounting Rs.30,00,000/- via NEFT/RTGS to the Respondent's Company, but as per the ledger account of the Respondent's Company maintained by the Applicant No.2 company in its books of accounts and bank statement the amount was repaid by the Respondent to the Applicants on 09.09.2017 through account/cash.

11. The Respondent further pleaded that the part repayment of loans to the Applicants on 28.04.2017 is reflected in the Ledger Account of the Applicants, for the period from 2016 to 2019.

12. The Respondent has questioned the timing of the issuance of the recall notice by the Applicants i.e., dated 27.01.2021, when the alleged part repayment was made to them only on 28.04.2017.

13. In reply to the recall notice dated 27.01.2021, given on 28.01.2021, the Respondent stated that the amount of debt recalled had already been repaid/refunded/handed over to the Applicants in parts over a period of time, and as such no amount remained payable by the Respondent to the Applicants.

14. There being an arbitration clause mentioned in the loan agreement dated 22nd of October 2014 and 3rd October 2014, the Respondent has



questioned the maintainability of the instant Application. The relevant clause of the agreement reproduced by the Respondent in its reply reads thus: -

“17. Any dispute or difference whatsoever arising out of or in relation to the construction, meaning, scope, operation or effect of any transaction/or the validity or the breach thereof arising out of or in connection with this agreement and for any other transaction between the parties shall be settled by arbitration of a sole arbitrator appointed by mutual consent of both parties and an alternate Arbitrator in place of the aforesaid Arbitrator in case of his death or being incapable or refusal to act or in the event of termination of his mandate for any reason. The arbitration proceedings shall be held at New Delhi. Both parties agree not to ask for any adjournment except extra-ordinary reasons. The award given by the arbitrator shall be final and binding upon the parties.”

15. The petition is liable to be dismissed as the Financial Creditor No. 1 is engaged in Brokerage services. It is pertinent to note that the role of a broker is merely to act as a middleman between two parties only for nominal interest in the transaction between the two i.e., commission. Therefore, there is no default toward the Applicants.

16. The Respondent also questioned the maintainability of the Application on the ground that it had been the modus operandi of the Applicants to transfer the money through RTGS to various parties including the Respondent and to pick up cash from them. To buttress the plea, the Ld. Counsel for the Respondent made a reference to the statement made by Mr. Ankit Bhageria, the Director of Applicants Company under section 132(4) of the Income Tax Act, 1961.



17. In reply filed by it, the Respondent put forth that the Applicants are not registered NBFC as their main object is to carry out trading activities and these are only the surplus fund of the Financial Creditor which are used for the purpose of granting ICD to generate income through interest for the company. As has been stated by the Applicants in the rejoinder filed by them, the financial statement of the company clearly states that less than 50% of its net worth lies in financial assets and less than 50% of its income is from financial activities. While rebutting the plea espoused by Respondent with reference to Section 45(1)(C) of RBI Act, the Applicants have pleaded that the loan granted by the Applicants to CD was in the form of inter-corporate deposit which was payable on demand and for inter-corporate deposit, the Applicants did not need any license.

18. We have heard the counsels for the parties and perused the record. In terms of the order dated 10.03.2021, this Adjudicating Authority had rejected the captioned Application being time-barred. The order was taken in Appeal before Hon'ble NCLAT. Taking the view that the Applicants herein had disbursed the last tranche of the loan on 28.03.2017 and 29.03.2017 and the Balance Sheet of the Respondent for F.Y. 2019-20 reflects the said amount, the Hon'ble NCLAT reversed the aforementioned order dated 10.03.2021 passed by this Adjudicating Authority. Taking the view that in terms of the judgment of the Hon'ble Supreme Court in Dena Bank (now Bank of Baroda) Vs. C. Shivakumar Reddy and Anr. and Laxmi Pat Surana vs. Union Bank of India, the Balance Sheets and Financial Statements of the CD constitute acknowledgement of liability which extend the limitation by 3 years, the Hon'ble NCLAT found that the present application filed in the month of



February 2021, was within limitation. Thus, on consideration of RA-01/2023 the captioned Application was restored to its original position. The Hon'ble NCLAT has already recorded a finding that the Balance Sheet of the CD for the F.Y. 2019 reflects the debt amount, thus it is not open for us to take a view contrary to the one taken by Hon'ble NCLAT. Nevertheless, for our satisfaction, we made a reference to the said Balance Sheet again and a perusal of the same reflects the short-term borrowing by the CD from RN Khemka Enterprises Pvt. Ltd. and Satsai Finlease Pvt. Ltd. i.e., the Applicants herein. When in the Application filed by it, the Applicants have espoused that the CD had deducted TDS on the interest payable to the Applicants on the deposits made by the Applicants with it, in rejoinder they have pleaded that the plea raised by the Respondent regarding non-compliance of Section 45(1)(c) is not tenable for the simple reason that the Applicants are not the NBFC and they could only deposit the amount of default with Respondent as ICD. In our considered view, if the Applicants have flouted any of the provisions of the RBI Act, they are liable to face action in accordance with law. For the purpose of consideration of an Application filed under Section 7(1) of IBC, 2016, what we need to see is that a default has occurred and the application is complete. At the time of default, the threshold limit was Rs. 1 Lakh. The Balance Sheet of the CD (ibid) reflects the defaulted amount more than that of the threshold amount. The financial debt means a debt disbursed against the consideration for the time value of money. In the present case, the debt given by the Applicants to CD was for interest i.e., the time value of money. The Financial Creditor is a person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or



transferred to. In the present case, on the basis of the Balance Sheet of CD referred to by Hon'ble NCLAT which reflects the acknowledgement of debt, we are satisfied that there is the disbursement of debt. As far as default is concerned, though the Respondent has pleaded that the amount of loan was repaid, but it could not produce any concrete evidence that the entire amount of loan referred to in the application has been repaid. As far as the plea of Arbitration Clause raised by the CD is concerned, it is stare decisis that the object of IBC, 2016, is to put the CD back on its feet and availability of remedy to the Applicant for redressal of its grievance would not operate as bar to the filing of Application under Section 7 of IBC, 2016. as has been held by Hon'ble NCLAT in Company Appeal (AT) (Ins.) No. 130 of 2022 in the matter of Mr. Amar Vora vs. City Union Bank Ltd. & Ors. dated 11.05.2022, the pendency of proceedings under the SARFAESI Act 2002 or any other proceedings do not come in the way of maintainability of the proceedings under Section 7 of IBC 2016. The relevant excerpt of the Judgement reads thus:-

"7. Now we take up point no. (ii)

It is the case of the Applicant that the financial Creditor issued notice under Section 13(2) of the SARFAESI ACT, 2002 for a default of Rs. 14,14,61,066/- for almost 12 accounts and the financial Creditor has also filed an application bearing OA No. 497 of 2019 before the DRT Madurai against the Appellant/ Corporate Debtor for recovery of debts of Rs.19,73,47,599/- and filing the application before the Adjudicating Authority for default in loan amount to the tune of Rs. 8,04,86,434/- with interest for the very same loan facility would amount to forum shopping and hence initiation of CIRP by the Adjudicating Authority cannot be maintained. Further, the Ld. Counsel submitted that an application being IA 844 of 2021 filed before the Adjudicating Authority praying the



Authority to keep abeyance till the matter in reference no. R-1929 of 2020 before the prohibition of Benami Property Transaction Act, 1988 is decided.

8. *The IBC, 2016 is a special enactment and is an act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate person, partnership firms and individual in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship. As held by the Hon'ble Supreme Court the aim and object of the Code is not for recovery of debts but for the Resolution of the Corporate Persons. In this regard Section 238 of I & B Code, 2016 deal with provisions of the Code to override other laws and the said provision reads as under:*

“The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.”

Without commenting upon the defiance of the provisions of RBI Act, 1934 or Section 186 of Companies Act, 2013 by the parties, in the wake of the order passed by the Hon'ble NCLAT and the Balance Sheet referred to by it, **we are left with no option but to admit the present application and order CIRP qua the CD. Ordered accordingly.**

Resultantly, moratorium qua the CD is declared in terms of Section 14 of the Code. As a necessary consequence of the moratorium in terms of Section 14(1) (a), (b), (c) & (d), the following prohibitions are imposed qua the CD, 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 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;
- (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.”

18. As proposed by the Applicant, this Bench appoints Mr. Rakesh Kumar Jain as IRP having Registration No. IBBI/IPA-002/IP-N00053/2017-2018/10105, Email id: <sirshree.rakesh@gmail.com> subject to the condition that no disciplinary proceedings are pending against the IRP so named and disclosures as required under IBBI Regulations, 2016 are made by him within a period of one week from this Order. This Adjudicating Authority orders that:

“Mr. Rakesh Kumar Jain, E-mail id: <sirshree.rakesh@gmail.com> as IRP having Registration No. IBBI/IPA-002/IP-N00053/2017-2018/10105 is directed to take charge of the CIRP of the Respondent with immediate effect. The IRP is directed to take the steps as mandated under the IBC specifically under Section 15, 17, 18, 20 and 21 of IBC, 2016.

19. The Applicant is directed to deposit Rs.2,00,000/- (Two Lakh) only with the IRP to meet the immediate expenses. The amount, however, will be subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the Applicant.



20. A copy of this Order shall be communicated by the Registry/Court Officer of this Tribunal to the Applicant, the Respondent and the IRP mentioned above. In addition, a copy of the Order shall also be forwarded by the Registry/Court Officer of this Tribunal to the IBBI for their records.

Sd/-
(L. N. GUPTA)
MEMBER (T)

Sd/-
(ASHOK KUMAR BHARDWAJ)
MEMBER (J)