

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

C.P. (IB) No. 503/KB/2018

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:

M/S. SIDDHA DOMICILE COMPANY PRIVATE LIMITED, a non banking Financial Company registered with Reserve Bank of India, having office at 12, Park Lane, Kolkata 700016

... Financial Creditor No. 1

And

In the matter of:

M/S. HIMAVANTA INVESTORS PRIVATE LIMITED, a non banking financial company registered with the Reserve Bank of India, having its office at 12, Park Lane, Kolkata 700016.

.... Financial Creditor No. 2

-Versus-

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IN THE MATTER OF:

M/S. ASHIKA COMMERCIAL PRIVATE LIMITED, having its Office at 1,
Grasting Place, Orbit, 4th Floor, Kolkata 700001.

... Corporate Debtor

**Coram: Shri Jinan K.R., Hon'ble Member (Judicial) &
Shri Harish Chander Suri, Hon'ble Member (Technical)**

Counsel on Record:

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|-------------------------------|---|----------------------------|
| 1. Mr. Jishnu Chowdhury |] | |
| 2. Mr. Ratul Das |] | For the Financial Creditor |
| 3. Mr. Nikunj Berlia |] | |
| 1. Mr. Joy Saha, Sr. Advocate |] | |
| 2. Mr. A.K. Singh, Advocate |] | For the Respondent |
| 3. Mr. Abir Debnath, Advocate |] | |

Date of pronouncement of Order: 22/08/2019.

ORDER

Per Shri Harish Chander Suri, Member (Technical).

1. This Company Petition CP(IB) 503/KB/2018 has been filed by M/s. Siddha Domicile Company Pvt. Ltd. hereinafter referred to as the Financial Creditor No. 1 and M/s. Himavanta Investors Pvt. Ltd. hereinafter referred to as Financial Creditor No. 2 under Section 7 of

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the Insolvency & Bankruptcy Code, 2016 read with Rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 against the Corporate Debtor **M/s. Ashika Commercial Private Limited.**

2. It is submitted by the Financial Creditor No. 1 M/s. Siddha Domicile Company Private Limited, a non banking finance company registered with Reserve Bank of India and had given a financial loan to Corporate Debtor to the tune of Rs. 71,30,560/- (Rupees Seventy One Lacs Thirty Thousand Five Hundred Sixty Only) and had made a demand for repayment of the loan vide its letter dated 23rd March, 2015 followed by another letter of demand for payment of interest with effect from 1st April, 2014 but the Corporate Debtor has not paid either the principal or the interest amount amounting to Rs. 1,05,53,230/- (Rupees One Crore Five Lacs Fifty Three Thousand Two Hundred Thirty Only) and has committed default in making the payment.
3. Similarly, the Financial Creditor No. 2 being a non banking Finance Company registered with Reserve Bank of India have given financial loan to the Corporate Debtor to the tune of Rs. 10,00,000/- (Rupees Ten Lacs Only) and the Corporate Debtor has repaid only the principal amount on 8th July, 2013 but has failed to pay interest amounting to Rs. 2,16,028/- (Two Lacs Sixteen Thousand and Twenty Eight Only) in spite of demand notice dated 23rd March, 2015 followed by another demand notice for payment of interest with effect from 1st April,

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2014. Accordingly a total sum of Rs. 3,19,720/- is stated to be due from the Corporate Debtor to the Financial Creditor and the Corporate Debtor has committed default in payment of the aforesaid amount.

4. The Financial Creditor No. 1 has admittedly based its claim on the deed of agreement, hereinafter referred to as "**Convertible Instrument**" entered into between the Financial Creditors and the Corporate Debtor whereby the Financial Creditor No. 1 had lent an advance to the Corporate Debtor, an aggregate sum of Rs. 61,30,560/- (Rupees Sixty One Lacs Thirty Thousand Five Hundred and Sixty Only) as unsecured loan, the value of which was reflected in the books of accounts of the Corporate Debtor as on 28th February, 2013. As per the aforesaid convertible instrument the parties had agreed to convert a sum of Rs. 52,80,000/- (Rupees Fifty Two Lacs Eighty Thousand Only) out of the above unsecured loan into common stock of the Corporate Debtor Company against which the Company agreed to issue its 22,000 equity shares to the Financial Creditor No. 1 @ Rs. 240/- per share, carrying Rs. 10/- towards the face value and Rs. 230/- towards share premium calculated on the basis of audited Balance Sheet of the Company drawn on 31st March, 2012.
5. It is further agreed in the said instrument that the Financial Creditor No. 1 accepted the aforesaid shares in consideration of Rs. 52,80,000/- which was reflected in the books of accounts of the

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Company. The Financial Creditor No. 1 has transferred the payment to the Corporate Debtor through Bank on different dates and the copy of the bank statements are placed on records.

6. It is submitted that the Corporate Debtor had unequivocally acknowledged the Financial Debt vide confirmation letter dated 31st March, 2013 and the Corporate Debtor had further deducted tax at source (TDS) on interest till March 31,2010. The Financial Creditor has submitted that the aforesaid convertible instrument was executed on 12th March, 2013 but immediately on March 13, 2013 the said instrument was cancelled by the Financial Creditor No. 1 which was duly accepted by the Corporate Debtor and the balance confirmation letter dated 1st April 2013 was issued by the Corporate Debtor, whereby a sum of Rs. 52,80,000/- has been admitted as an unsecured loan from M/s. Siddha Domicile Company Private Limited. The Financial Creditor has specifically mentioned in the said cancellation letter/withdrawal of consent letter that they being the Lender, Siddha Domicile Co. Pvt. Ltd. does not subscribe to the clause of conversion as its investments are not in shares but in the Corporate Debtor itself which is engaged in trading and manufacturing activities and that its loan account cannot be converted into shares.
7. It is submitted that the Financial Creditor has repudiated, rescinded, revoked and/or withdrawn the consent given in the said convertible instrument dated 12th March, 2013 with immediate

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effect, in its letter dated 13th March, 2013. Now, according to the Financial Creditor No. 1, the amount of loan was not to be converted into equity shares and would remain as unsecured loan with the Corporate Debtor after the issuance of the cancellation letter dated 13th March, 2013 and would be carrying an interest @ 9% per annum from the said date.

8. The Ld. Counsel for the Corporate Debtor submitted two pronged arguments. According to the Ld. Counsel, the Financial Creditor cannot be allowed to have the cake and eat it too. According to the Ld. Counsel, the convertible instrument was duly signed by both the parties with their free consent and was duly acted upon as well whereby 22000 equity shares were allotted to the Financial Creditor No. 1 against the amount of Rs. 52,80,000/- and the remaining amount was the unsecured loan in favour of the Financial Creditor.
9. It is submitted that the Financial Creditor had been participating in the day-to-day affairs of the Corporate Debtor and innumerable documents have been signed and placed on record by the Corporate Debtor to prove that the shares were actually registered in the name of the Financial Creditor which was very much within their knowledge. The Ld. Counsel further submitted that if the shareholder is in control of the affairs of the Company, it cannot file any proceedings against the Company for the activities which had been carried out by it during its own tenure as a shareholder.

According to the Ld. Counsel, the letter dated 13th March, 2013 (13.03.2015) and the letter of confirmation dated 1st April, 2013 are all forged and fabricated documents and cannot be taken note of/or allowed to be relied upon.

10. It is submitted on behalf of the Financial Creditor No. 1 that the Corporate Debtor was issuing confirmation of accounts from time to time. The confirmation of accounts from 1st April, 2010 to 31st March, 2011 was admittedly given by the Corporate Debtor reflecting Rs. 54,30,560/- as the closing balance as on 31st March, 2011 which also reflect in the balance brought forward as on 1st April, 2010 being Rs. 54,30,560/-. Similarly, confirmation of accounts was issued by the Corporate Debtor to the Financial Creditor No. 1 on 1st April, 2012 which reflected the closing balance payable to the Financial Creditor in the sum of Rs. 61,30,560/- and next in the series was the confirmation of accounts dated 1st April, 2013 for the year 1st April, 2012 to 31st March, 2013 reflecting the amount due to the Financial Creditor No. 1 being Rs. 61,30,560/- (though this document is disputed by the Corporate Debtor as forged one). According to the Financial Creditor denial of documents dated 1st April, 2013 (confirmation of accounts from 1st April, 2012 to 31st March, 2013) and letter dated 13th March, 2013 from the Financial Creditor No. 1 to the Corporate Debtor whereby the consent for convertible instrument dated 12th March, 2013 for allotting 22000 shares was (allegedly) withdrawn by the Financial Creditor No. 1, has no

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meaning. Once the amount is admitted in the balance confirmation letters, and due and there is a default in payment there-of, the petition is bound to be admitted and Corporate Insolvency Resolution Process has to be initiated.

11. It is submitted that in view of the aforesaid documents, the plea of the Corporate Debtor that the whole claim of the Financial Creditor is barred by time is completely belied.
12. Without going into the previous transactions between the parties, we shall start with the balance confirmation issued by the Corporate Debtor from time to time. It is admittedly the case of the Corporate Debtor that vide convertible instrument dated 12th March, 2013, the Financial Creditor had advanced a sum of Rs. 61,30,560/- as unsecured loan out of which Rs. 52,80,000/- was adjusted against 22000 shares allotted to the Financial Creditor No. 1 @ Rs. 240/- per share thereby leaving a balance of Rs. 8,50,560/- with the Corporate Debtor as on 31st March, 2013. Even though the Financial Creditor No. 1 is stated to have withdrawn the consent accorded to the convertible instrument dated 12th March, 2013 (written as "12.03.2015" in the letter dated 13th March, 2013) written by Financial Creditor No. 1 to the Board of Directors of the Corporate Debtor, but, as per the Corporate Debtor, the same had been duly acted upon and the shares had been allotted and registered in the name of the Financial Creditor No. 1 and entered into the Register of

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shareholders and the same was duly conveyed to the Registrar of Companies as well.

13. It is further submitted by the Corporate Debtor that the Financial Creditors are very well in the know of all these actions, and cannot be ignorant of all these developments and cannot say that since the consent had been withdrawn, the whole amount will again fall due to it. It is stated that the consent cannot be allowed to be withdrawn unilaterally. The Corporate Debtor has however admitted during the course of arguments that a sum of Rs. 18,50,000/- was only due to the Financial Creditor No. 1 and since no suit has been filed by the Financial Creditor No. 1 against the Corporate Debtor, the claim has become time barred.
14. As regards the claim of Financial Creditor No. 2 a cheque of Rs. 10,00,000/- had been issued by Financial Creditor No. 2 on 23rd April, 2007 in favour of the Corporate Debtor which was duly repaid by it on 8th July, 2013 on the request of Financial Creditor No. 2 and is reflected in the Bank statement enclosed with the reply affidavit as Annexure "C" and since then no suit or proceedings have ever been filed by Financial Creditor No. 2 and if at all there is any claim that has become barred by time.
15. The Financial Creditor has also proposed the name of the Insolvency Professional **Mr. Manish Jain** of Manish Mahavir & Company, 2B, Grant Lane, 3rd Floor, Room No. 303, near Lal Bazar,

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Bata, Kolkata 700012, **having Reg. No. IBBI/IPA-001/IP-P00582/2017-18/11023**, who has also sent a written communication dated 17th March, 2018 giving his consent to accept the appointment as an IRP.

16. Without going into the merits of the innumerable number of documents filed by the parties on both sides, we confine the scope of dispute between them as per the requirement of the Insolvency & Bankruptcy Code, 2013 which specifically provide that if a financial debt of Rs. 1,00,000/- (Rupees One Lakh Only) or more is due and a default is proved, admission of the application has to be done and CIR Process has to be initiated. As per section 3(12) "*Default*" *'means 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.* In the present case, admittedly, a sum of Rs. 18,50,000/- is due to the Financial Creditor No. 1 by the Corporate Debtor after the adjustment of the price of the equity shares allotted to the Financial Creditor, and since the said amount is payable on demand which has not been repaid in spite of notice issued on 23rd March, 2015, which was duly replied to by the Corporate Debtor thereby denying any liability, and the averments of the notice as "false and frivolous allegations", the petition deserves to be admitted and initiation of Corporate Insolvency Resolution Process has to be ordered. We, therefore pass the following orders.

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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, M/s. Ashika Commercial Private Limited is hereby **admitted**.
- ii) 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.
- iii) 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 judgement, 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;

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- (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.
- iv) 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.
- v) 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.
- vi) The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.
- vii) 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

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cease to have effect from the date of such approval or liquidation order, as the case may be.

- viii) **Mr. Manish Jain**, an Interim Resolution Professional having **Registration No. IBBI/IPA-001/IP-P00582/2017-18/11023**, E-mail ID: manishmahavir@gmail.com, Mobile No.9830248684, is hereby appointed as Interim Resolution Professional by this Tribunal for ascertaining the particulars of creditors and convening a meeting of Committee of Creditors for evolving a resolution plan.
- ix) 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.
- x) The Operational Creditors/Applicant is directed to deposit Rs. 3,00,000/- (Rupees Three Lakhs Only) in the ESCROW Account in SBI to be operated through the Registrar NCLT, Kolkata Bench for the purpose of meeting the preliminary expenses for initiating the CIRP by the Interim Resolution Professional within one week of the date of this order.
- x) The Registry is hereby directed under section 7(4) of the Insolvency and Bankruptcy Code, 2016 to communicate the

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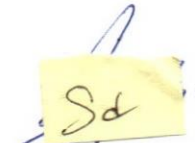
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order to the Financial Creditor, the Corporate Debtor and to the I.R.P. by Speed Post as well as through E-mail.

- xi) List the matter on **23rd September, 2019** for filing of the progress report.
- xii) 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 (T)



(Jinan K.R.)
Member (J)

Signed on this 22nd day of August, 2019.

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