

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

I.A.(IB)1021/KB/2022

In

C.P (IB) No.1376/KB/2018

*An application under section 60(2) read with Section 60(5) of the Insolvency
and Bankruptcy Code, 2016.*

In the matter of

Dewesh Auto Creative Services Pvt.Ltd.

... Financial Creditor

-Versus-

A.K.Power Industries Private Limited

... Corporate Debtor

And

Pratim Bayal, Liquidator , A.K.Power Industries Private Limited, having its office at CK-104, Sector-2, Salt Lake City, Kolkata -7900091.

....Applicant

Order Pronounced on : 14.07.2023

Coram:

Rohit Kapoor, Member (Judicial)

Balraj Joshi, Member (Technical)

Counsel/Authorised Representative appeared through Video Conference

Mr. Jishnu Chowdhury,Adv.] For the Liquidator

Ms.Aparajita Rao, Adv.]

Ms.Ankana Basu, Adv.]

Mr.Pratim Bayal, Liquidator in person

Ms.Debaleena Ganguly, Adv.] For the Financial Creditor

Mr.Debabrata Ganguly,Adv.]

Mr. Snehasish Chakraborty,Adv.] For State Bank of India

Mr.Debasish Chakrabarti,Adv.]

Mr. Shaunak Mitra,Adv.]For Suspended Member of BoD of CD

Mr.Sanwal Tibrewal,Adv.]

ORDER

Per: Rohit Kapoor, Member (Judicial)

1. The Court is convened via hybrid mode.
2. This IA has been filed by the Liquidator of A.K. Power Industries Private Limited under Section 60(2) read with Section 60(5) of the Insolvency and Bankruptcy Code, 2016 seeking extension of time of one year for completion of Liquidation process.
3. It is borne out from the averments contained in this IA that the Corporate Debtor was admitted to Corporate Insolvency Resolution Process (CIRP) in an application filed under section 7 of IBC Code, 2016 by an order dated 30-09-2019 passed in CP (IB)1376/KB/2018.
4. There being no resolution, the order of liquidation was passed on 11th August 2021 in IA 199/KB/2021.
5. In IA 793/2021, an order dated 11th August 2021 came to be passed whereby the Financial Creditor was called upon to produce the original Loan Agreement before this Adjudicating Authority. This order dated 11-08-2021 was challenged by appellant with 2 % voting share in CoC and to the extent of appointment of RP as the liquidator. This appeal was dismissed vide order dated 27.04.2022 (Annexure B) with IA.
6. In another Appeal filed by the Financial Creditor against the order dated 11th August 2021 passed by this Adjudicating Authority directing production of original agreement, Hon'ble NCLAT dismissed the Appeal vide order dated 20-05-2022(Annexure C of the IA) with the following observations;

“ Be that as it may. We do not find any error in the direction issued by the Adjudicating Authority directing the Appellant to produce the original document. It is open for the Appellant to file a Compliance Affidavit in pursuance of the direction before the Adjudicating Authority and it is for the Adjudicating Authority to take further proceeding in accordance with law”.

7. It be noted when the appeal filed by the Financial Creditor was pending before the Hon'ble NCLAT, an order came to be passed by this Adjudicating Authority on 15.02.2022, wherein awaiting the outcome of the Appeal before the Hon'ble NCLAT, vide order dated 15-2-2022 it was directed that no further liquidation process will take place. Order dated 11th August,2021 was kept in abeyance to the extent that the Liquidator will not proceed with the Liquidation of the Corporate Debtor till final outcome of the appeal. Extract of order dated 15.02.2022 is reproduced herein after:

“ Ld.Counsel for the Financial Creditor, however, submits that the order dated 11/08/2021 has been challenged in an appeal before the Hon'ble NCLAT. It is stated that even though the appeal was filed sometime in the month of September, 2021, the same has not been listed so far. To await the outcome in the appeal before the Hon'ble NCLAT, it is directed that no further liquidation process will take place. The order dated 11/08/2021 is kept in abeyance, in the meanwhile, to the extent that the Liquidator will not proceed with the liquidation of the Corporate Debtor till final outcome of the appeal, because the Agreement which is stated to be a forged and fabricated one had been used to have the CIRP of the Corporate Debtor initiated and its production before this Adjudicating Authority shall positively impact the whole proceedings and this Bench doesn't want the liquidation process to continue and reach a stage from where there is no come back, or it is difficult to undo the whole process”.

8. In the present IA, it is contended that in view of dismissal of an appeal by the Hon'ble NCLAT on 20.05.2022 (Annexure C), there is no embargo to proceed with the liquidation process.
9. This IA is however vigorously contested by suspended Board of Directors. The stand taken by the suspended Board of Directors is summarized as under: -
- i. The Loan Agreement relied upon by the Financial Creditor in Section 7 application is forged. Financial Creditor has failed to produce this document before this

Adjudicating Authority, despite repeated directions including that of Hon'ble NCLAT in its observations contained in order dated 20th May,2022”.

- ii. Suspended Management has also filed an F.I.R. in respect of Loan Agreement dated 19th December,2014, the same being forged. It is further stated in the written notes filed by Suspended Management that police authorities have filed a charge sheet arraying the Financial Creditor and its Directors as the accused and the trial in the matter has started.
- iii. Fraud vitiates everything' and therefore the order of admission of Section 7 is liable to be recalled and consequently the entire liquidation process as well.
- iv. Since it is mentioned in this agreement in the event of dispute and or difference arising under this agreement including any dispute with respect to outstanding, the same shall be resolved by any governing body (NCLT) or others. The NCLT was not in existence as on this date of alleged agreement. Therefore, the question of referring to any dispute to NCLT could not arise. This prima facie speaks for this agreement to be forged and fabricated.
- v. This aspect of the matter was never considered by this Adjudicating Authority while passing the order of admission. Since the fraud vitiates everything including any solemn order therefore there is no question of extending the liquidation period and the position prior to CIRP is required to be restored by cancelling the order of admission passed by this Adjudicating Authority.
- vi. Ld. Counsel appearing for Liquidator in its Rejoinder argued and has taken us through paragraphs 4 & 8 of order of admission dated 1st October,2019 by this Adjudicating Authority, which are as under: -

“4. The Ld. Counsel for the Corporate Debtor initiated his proceedings by emphatically arguing that subject loan agreement was a forged one and could be sent for forensic examination as per rule 43 of NCLT Rules,2016. As regards the genuineness of the agreement, he submitted that one Archana Mallick had signed the agreement, whereas the agreement had been executed by an on behalf of the Corporate Debtor by Mr. Ayan Mallick. He made his second plea that the entire amount had been paid, hence, no debt remains due and payable. For this proposition, he took us to pages no. 7 & 9 showing the transactions of receipt and repayment of money.

8. As far as the genuineness of the loan agreement is concerned, we do not find any merit in the said contentions of the Corporate Debtor for the reason that even before this loan agreement, also money had been taken and repaid by the Corporate Debtor from the Financial Creditor. Further, for the purpose of IBC, 2016, the fact of obtaining loan is sufficient to create an obligation to repay the same which is a claim of the Financial Creditor to receive the payment. Further, the obligation to repay the loan arises from the promise to pay which is implied in law and is also based upon ethical principle of business. Thus, for these reasons, we are of the view that this contention of the Corporate Debtor is devoid of any merit”.

Analysis and determination:

- A.** Loan agreement dated 19-12-2014 , though not produced in original by parties or the liquidator despite repeated directions by this Adjudicating Authority as referred above and also vide order dated 20.05.2022 by the Hon’ble NCLAT, it is significant to note argument of Ld. Counsel appearing for suspended board that this loan Agreement (Photo copy Annexure F page 16 of CP) mentions in 21 para d, *“in the event of dispute and or difference arising under this agreement including any dispute with respect to outstanding, the same shall be resolved by any governing body (NCLT) or*

others” and whereas NCLT was constituted only on 01.06.2016. This makes the agreement suspicious on the face of it.

- B.** *Per Contra*, Ld. Counsel for liquidator/applicant argued the order of admission was passed not only based on loan agreement 19.12.2014 but also considering money taken otherwise from FC. This is a factual aspect and if the Corporate Debtor was not satisfied with correctness of this aspect in order dated 08.10.2019, the remedy was to file an appeal. This Adjudicating Authority cannot assume the appellate jurisdiction to correct a finding of fact. Order of admission, as is revealed, was passed after hearing the Corporate Debtor and appeal thereto admittedly was not filed by the Corporate Debtor and order of admission is binding between the parties. While considering this aspect, we also note the written submissions of Corporate Debtor filed on 09.06.2023 before this Adjudicating Authority, extract reproduced herein after:

After the admission order, the Management did not have any other proof to establish that the documents were forged before the Hon’ble NCLAT. Furthermore, poor legal advice and limitation of funds led to Management deciding not to proceed with the Appeal.

(Emphasis supplied)

This reason, in our view, for not filing an appeal is legally unacceptable.

- C.** Further, Ld counsel for applicant has contended that without an application and only verbally, suspended board is seeking discontinuation of liquidation which is impermissible in law.
- D.** We also note that no appeal was filed by CD against the order of admission dated 09.10.2019.
- E.** Though, we find force in plea of the Ld. counsel for suspended management in regard to the loan agreement dated 19.12.2014 as indicated in para-A above, however, in the facts and circumstances
-

noted in paragraph B, C & D above, we have no option except to allow this application and extend the time of liquidation.

- F.** This IA is allowed with all just exceptions and liquidation period completing the entire process is extended by **Nine Months** from the date of this order.

Balraj Joshi
Member(Technical)

Rohit Kapoor
Member(Judicial)

This order is pronounced on the 14th day of July, 2023

FA_LRA