

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
COURT-II
KOLKATA**

CP (IB) No. 1146/KB/2020

In the matter of:

A petition under section 7 of the Insolvency and Bankruptcy Code, 2016.

In the matter of:

DD Infrastructures Private Limited
[CIN:U45400WB1998PTC086562]

...Financial Creditor

Versus

Dadheech Infrastructures Private Limited
[CIN: U14219WB2007PTC114838]

...Corporate Debtor

Order pronounced on: 09 January 2023

Coram:

Shri Rohit Kapoor : **Member (Judicial)**
Shri Balraj Joshi : **Member (Technical)**

Appearances (through hybrid mode):

For the Financial Creditor : Mr. Shaunak Mitra, Advocate
Mr. Patita Paban Bishwal, Advocate
Mr. Amandeep Singh, Advocate
For the Corporate Debtor : Ms. Manju Bhuteria Advocate
Mr. Saurav Jain, Advocate

ORDER

Per Balraj Joshi, Member (Technical)

1. This Court convened through hybrid mode.

2. This is a Company Petition filed under section 7 of the Insolvency and Bankruptcy Code, 2016 by **DD Infrastructures Private Limited**, represented by **Mr. Bharat Bhusan Sharma**, authorized through a Board Resolution dated 21 January 2020¹, seeking to initiate Corporate Insolvency Resolution Process (“CIRP”) against Dadheech Infrastructures Private Limited (“Corporate Debtor”).
3. The Corporate Debtor was incorporated on 29 March 2007, having CIN: U14219WB2007PTC114838 under the Companies Act, 1956. It’s registered office is 9/12, Lal Bazar Street, E Block, 4th Floor, Kolkata- 700001. Therefore, this Bench has jurisdiction to deal with this petition.
4. The present petition was filed on 20 October 2020 before this Adjudicating Authority on the ground that the Corporate Debtor has defaulted to make a payment of a sum of Rs.9.09.82.716/- (Rupees Nine Crore Nine Lakh Eighty-Two Thousand Seven Hundred and Sixteen only) as on 31 December 2019. The date of default has been mentioned as 31 March 2019.

Submission of Mr. Shaunak Mitra, learned Counsel appearing for the Financial Creditor

5. The learned Counsel submitted that the Financial Creditor had provided business accommodation loan of Rs.5,74,60,000/- (Rupees Five Crore Seventy Four Lakh Sixty Thousand only) at an interest @ 15% per annum which was transferred through several transactions from 27 September 2014 to 06 May 2015.
6. The total amount of debt amount to Rs. 10,53,32,716/- (Rupees Ten Crore Fifty Three Lakh Thirty Two Thousand Seven Hundred and Sixteen only), the Corporate Debtor made a refund of Rs.1,43,50,000/-

¹ Annexure A-2 @ Pg. 14 of C.P.

(Rupees One Crore Forty Three Lakh Fifty Thousand only). Hence the total amount due is Rs.9,09,82,716/- (Rupees Nine Crore Nine Lakh Eighty Two Thousand Seven Hundred and Sixteen only).

7. The Corporate Debtor has admitted the debt and has also acknowledged that the default was committed. The learned Counsel submitted that the Corporate Debtor entered into an agreement on 31 March 2018 wherein the Corporate Debtor promised to repay the principal amount along with interest within 21 March 2019.
8. The Financial Creditor has placed the following documents on record:
 - a. Copies of Bank Statement. [**Annexure A-8 at Pp. 36-49 of the Company Petition**] as proof of disbursal
 - b. Letter of Acknowledgement dated 07 May 2015. [**Annexure A-9 @ Pg. 50 of the Company Petition**]
 - c. Copy of the loan agreement dated 31 March 2019. [**Annexure A-10 @ Pgs. 51-53 of the Company Petition**]
9. The Financial Creditor has proposed the name of **Mr. Suresh Chandra Pattanayak**, registration number IBBI/IPA-002/IPN00759/2018-19/12384, as the Interim Resolution Professional of the Corporate Debtor. The proposed Interim Resolution Professional has given his written communication in Form 2 as required under rule 9(1) of the Insolvency and Bankruptcy [Application to Adjudicating Authority] Rules, 2016².

Submission of Ms. Manju Bhuteria, learned Counsel appearing for the Corporate Debtor

10. The learned Counsel appearing on behalf of the Corporate Debtor raised five defenses:

² Annexure A-5 @ Pp. 19-28 of CP

- a. The Company Petition has been filed by the Financial Creditor in gross suppression of material facts. The Financial Creditor has approached this Adjudicating Authority with unclean hands and in abuse of the process of law.
 - b. The Company Petition is barred by laws of limitation
 - c. Annexure A9 and A-10 annexed to the petition i.e. alleged Letter dated 7 May 2015 at Page 50 of the petition and alleged agreement dated 31 March 2018 are forged and fabricated documents.
 - d. The Company Petition has been filed with fraudulent and malicious intent.
 - e. The application is hit by Section 10A of the Code.
11. Ms. Bhuteria contended that the Financial Creditor has filed the application in gross suppression of material facts. The learned Counsel submitted that Manoj Kumar Sharma who was the Director of the Financial Creditor was a friend of the director of the Corporate Debtor, namely, Mr. Sanjeev Kumar Sharma and due to this friendly relationship, the Financial Creditor and its group company, namely, Harsha Consortium Private Limited (“*HCPL*”) agreed to grant interest-free loan to the Corporate Debtor.
12. The Financial Creditor disbursed interest-free loan of Rs.5,74,60,000/- to the Corporate Debtor between 27 September 2014 and 06 May 2015, HCPL disbursed a loan of Rs.2,50,00,000/- to the Corporate Debtor on 07 May 2015.
13. The Financial Creditor represented to the Corporate Debtor that the Financial Creditor and HCPL have taken loan from SREI Equipment Finance Ltd. (“*SREI*”) and requested the Corporate Debtor to make

payment on behalf of the Financial Creditor and HCPL to SREI and represented that the said sum would be adjusted with the sums payable by the Corporate Debtor to the Financial Creditor and HCPL.

14. The Corporate Debtor has refunded a sum of Rs.1,43,50,000/- between 19 May 2015 and 12 December 2016 to the Financial Creditor and made a payment of Rs.2,83,37,200/- to SREI on behalf of the Financial Creditor and payment of Rs.21,00,000/- to HCPL and Rs.2,92,68,800/- to SREI on behalf of HCPL. It is further submitted that the excess amount deposited on behalf of HCPL would be adjusted to the account of the Financial Creditor.
15. The Corporate Debtor has made payment of a total sum of Rs.7,40,56,000/- to SREI on behalf of the Financial Creditor and HCPL. The total amount disbursed by the Financial Creditor and HCPL is Rs.8,24,60,000/-, thus after payment, a balance amount of Rs.84,04,000/- remains. The amount that is due is below the threshold limited.
16. The learned Counsel submitted that the last payment was made on 21 July 2017 and the Company Petition has been filed on October 2020, hence the Company Petition is barred by limitation.
17. The learned Counsel then led us through Annexure A-9 and Annexure A-10 which are annexed to the Company Petition. It is submitted that Annexure A-9 i.e. the letter dated 07 May 2015 was never issued by the Corporate Debtor. The address mentioned in the letter head is incorrect, there is no Room No. 9A in the address of the Corporate Debtor. The correct address would be also evident from letters of the respondent which are annexed to the Reply. It is evident from the above that the said letter has been manufactured and forged by the Financial Creditor with an ulterior motive and malafide intention and is an afterthought.

The loan was a friendly transaction which was given interest-free to the Corporate Debtor.

18. The letterhead, stamp and signature affixed on the said letter are forged and fabricated and the same has been done with an intent to cheat. The signature and stamp appearing in the said letterhead are not that of the respondent. The letterhead of the respondent contains a logo which would be evident from the sample letter annexed at Pp. 12 to 39 of the Affidavit-in-reply.
19. Ms. Bhuteria then led us through the agreement dated 31 December, 2018 annexed to the Company Petition being Annexure-AIO at Pp. 51 to 53 of the Company Petition and submitted that it is a forged and fabricated document. It is further submitted that the said agreement has never been entered into by the Corporate Debtor. The signature and the stamp appearing on the said agreement is not that of the Corporate Debtor or any director of the Corporate Debtor. The said agreement is a forged and fabricated document and the same would be evident from the fact that the alleged agreement does not take into account the payments made to the Financial Creditor and SREI on behalf of the Financial Creditor. The loan was an interest free loan and the Corporate Debtor

Rejoinder to the reply of the Corporate Debtor

20. The Corporate Debtor has contended that the loan given was an interest free loan which it is not, but in any case, it is now a settled law that an interest free loan would be considered as financial debt under section 5(8) of the Code, the learned Counsel placed reliance on the judgment passed by the Hon'ble Supreme Court in ***Orator Marketing Private Limited v. Samtex Desinz Private Limited (2021) SCC OnLine SC 513***, (para 31). Hence, the Corporate Debtor is under obligation to repay the loan amount to the Financial Creditor.

21. The Corporate Debtor has come up with a concocted and false story that several amounts were paid to SREI in purported discharge of the Corporate Debtor's liability to the Financial Creditor and Harsha Consortium Private Limited which is totally bogus. The documents relied upon by the Corporate Debtor are manufactured and have not been signed by the Financial Creditor, addressed to the Financial Creditor nor acknowledged by the Financial Creditor in any manner.
22. However, even if one were to assume but without admitting that the concocted story of the payments to SREI is valid then, The total amount to be paid by the Corporate Debtor would be Rs.6,81,10,000/- and the Corporate Debtor has alleged to have made a payment of Rs. 5,76,06,000/- which would still mean that a minimum sum of Rs.1,05,04,000/- would still remain due and payable to the Financial Creditor.
23. The Corporate Debtor has vaguely denied that the Admission letter and the Agreement were not executed by the Corporate Debtor but has not filed anything on record to substantiate such denial.
24. However, considering either scenario, the Corporate Debtor is in default of payment of an amount which is above the threshold limit.

Analysis and Findings

25. Heard the learned Counsel appearing for the Financial Creditor and the learned Counsel appearing for the Corporate Debtor and perused the record.
26. Before considering the defenses raised by the Corporate Debtor, let us peruse the Company Petition and whether the statements made by the Financial Creditor and documents filed by it, can bear examination.
27. The Financial Creditor has initially submitted in its Company Petition, that the loan was given along with an interest but has later changed its stand and submitted that even if we consider it to be an interest free

loan, the said loan would still fall under the definition of Financial Debt. Hence, the Financial Creditor is shifting its statements as it suits the Financial Creditor.

28. No document has been filed by the Financial Creditor with respect to the sanction of the loan, which would indicate the terms and conditions which would mention the term of the loan, whether it was interest free or not, whether any security has been given. The Financial Creditor has filed a letter given by the Corporate Debtor acknowledging the receipt of the loan dated 07 May 2015, which has been disputed by the Corporate Debtor and the authenticity of such letter has been challenged on the basis of the letterhead. Be that as it may, the Corporate Debtor has acknowledged the receipt of the loan hence, there is no denial that the Financial Creditor had disbursed loan to the Corporate Debtor.
29. Next, let us examine the agreement dated 31 March 2018 that has been annexed as Annexure A-10, the said agreement lacks stamp duty, notarization, and even if those are ignored, then there is no Board Resolution of the Financial Creditor or the Corporate Debtor allowing the signatories of the said entities to enter into any agreement. Further, such agreement has been shown to have been entered into just before the expiry of three years.
30. Moreover, if the Corporate Debtor has agreed to be in default then why would the Financial Creditor calculate and state that even if the payments made to SREI are calculated, an amount would still be pending. It is clear that the Financial Creditor is not taking a clear stand and has come before this Adjudicating Authority with a questionable behaviour.

31. The Financial Creditor has submitted that the Corporate Debtor has made a false statement with regard to SREI but has not filed any other document to substantiate its relation with the Corporate Debtor.
32. The matters raised by both the Financial Creditor and the Corporate Debtor are the matters that cannot be adjudicated in a summary proceeding. However, it is apparent that the application is not aimed at resolving insolvency of the corporate debtor.
33. In view of the abovementioned observations, the **CP (IB) No. 1146/KB/2020** is rejected. The financial creditor is at liberty to seek other remedies that may be available to it under any other law.
34. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Rohit Kapoor
Member (Judicial)

This order is pronounced on the 9th day of January 2023.

GGRB_LRA