

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH (Court-II)
KOLKATA**

CP(IB) No. 488/KB/2020

*A 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*

In the matter of:

Nilkanth Dealcom Private Limited , a company constituted under Companies Act, 1956, and being a company within the meaning of Companies Act, 2013, having CIN: U51909WB2009PTC136081 and having it's Registered Office at 38, Chakraberia Lane, Rushabh Apartment, P.S.- Ballygunge, P.O.- Lala Lajpat Rai Sarani, Kolkata- 700020, in the state of West Bengal

.....Financial Creditor

Versus

Fairdeal Vintrade Private Limited, a company constituted under the relevant provisions of the Companies Act, 1956, and being a company within the meaning of Companies Act, 2013, having CIN: U51109WB2008PTC127806 and having it's Registered Office at P.S. Srijan Tech Park, DN – 52, DN Block, 6th Floor, Unit No.- 601, Sector- V, Salt Lake City, Kolkata- 700091, in the state of West Bengal

.... Corporate Debtor

Date of hearing: 22 August 2022

Date of pronouncing the order: 27 September 2022

Coram:

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

Appearances (via video conferencing/ physical):

For the Financial Creditor:

Mr.Raj Singhania, PCA

For the Corporate Debtor:

Mr. Rishav Banerjee, Advocate

Ms. Namrata Basu, Advocate

ORDER

Rohit Kapoor, Member (Judicial)

1. This Court convened through hybrid mode.
2. This Company Petition under section 7(1) of the Insolvency and Bankruptcy Code, 2016 (IBC) read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, has been filed by Mr. Viney Deep Ghai on behalf of and authorised by **Nilkanth Dealcom Private Limited** (*hereinafter referred to as the Financial Creditor*), seeking to initiate Corporate Insolvency Resolution Process (CIRP) against **Fairdeal Vintrade Private Limited** (*hereinafter referred to as the Corporate Debtor*).
3. The Corporate Debtor is a private company incorporated on 24.07.2008. The nominal share- capital of the company is ₹40,00,000/- and the paid-up share- capital of the company is ₹39,76,260/-.
4. The principal amount claimed by the Financial Creditor is ₹1,30,00,000/- along with interest of ₹1,61,15,155/-.. The debt fell due on 27.02.2017 *i.e* the date since last payment was received by the Financial Creditor. The name of the Interim Resolution Professional has been proposed in the petition.
5. **Submissions on behalf of the Financial Creditor:**
 - 5.1 The case of the Financial Creditor is that it provided a loan in the form of Inter Corporate Deposit (ICD) of ₹2,00,00,000/- on 07.02.2014, amount transferred from their Bank of Baroda Account via RTGS. The said loan amount was disbursed as per mutually agreed rate of interest for a short tenure and was repayable on demand.

- 5.2 The Corporate Debtor initially failed to repay the same despite repeated reminders. Later, the Corporate Debtor issued three cheques favouring the applicant for an aggregate amount of ₹1,00,00,000/- towards part repayment of the said ICD. Out of the three cheques, two cheques got cleared on 15.10.2016, but the third cheque *i.e* cheque no. 000053 for an amount of ₹50,00,000/- was returned dishonoured due to insufficient funds.
- 5.3 Again, after repeated requests, the Corporate Debtor repaid ₹14,00,000/- through NEFT directly in the bank account of the Financial Creditor on 23.02.2017 and ₹6,00,000/- through RTGS directly in the bank account of the Financial Creditor on 27.02.2017.
- 5.4 Thereafter, the Corporate Debtor continued to give verbal assurances regarding the repayment of the balance amount to the Financial Creditor but never made further payments.
- 5.5 Multiple demand letters 15.01.2020 and 22.01.2020 were sent by the Financial Creditor to the Corporate Debtor on 15.01.2020 and 22.01.2020. further, on 18.01.2020, the Financial Creditor also issued a demand notice vide email to the Corporate Debtor. However, till date the Corporate Debtor has neglected to give any response to the Financial Creditor regarding the same and also failed to make further payments.
- 5.6 The debt fell due on 27.02.2017 *i.e* the date since last payment was received by the Financial Creditor. The same is the date of default. The principal amount claimed by the Financial Creditor is ₹1,30,00,000/- and the interest component amounts to ₹1,61,15,155/-.
- 5.7 In support of its claims, the Financial Creditor has relied on the following documents:
- a. Bank Statements from 22.01.2013 to 14.01.2020, being Annexure B;
 - b. Master Data of the Corporate Debtor, being Annexure D;
 - c. Dishonoured cheque and return memo, being Annexure E;

- d. Audited Accounts of the Corporate Debtor for the Financial Year 2018-19, being Annexure J.

6 Submissions on behalf of the Corporate Debtor:

- 6.1 The Corporate Debtor has submitted that Sri Viney Deep Ghai, director of the Financial Creditor is not authorised by a proper Board Resolution to initiate any action on behalf of the applicant.
- 6.2 Further, the loan purported to be provided by the Financial Creditor to the Corporate Debtor is contrary to the provisions of the Companies Act, 2013 and hence the instant petition filed under section 7 of the Code is not maintainable.
- 6.3 The Financial Creditor has failed to disclose the correct facts of the case regarding payments made by the Corporate Debtor to it and has also suppressed all relevant documents regarding the same. The Corporate Debtor has made payments to the Financial Creditor to the tune of Rs.1,29,50,000/- which has been suppressed by the Financial Creditor.
- 6.4 The Corporate Debtor was taken over by the present directors in the year December, 2015 and the aforesaid payments to the Financial Creditor have been made by the previous director of corporate debtor Mr. Sumit Agarwal. The previous directors of the Corporate Debtor did not disclose the aforesaid loan provided by the Financial Creditor to the present directors of the Corporate Debtor at the time of takeover. Infact, the present directors of the Corporate Debtor did not have any clue regarding the existence of the purported loan till the time the Corporate Debtor received a notice from the Financial Creditor demanding repayment thereof.
- 6.5 The Corporate Debtor, upon receiving the said notice, immediately contacted the previous director Mr. Sumit Agarwal. The said Mr. Sumit Agarwal assured to the corporate debtor that there are certain disputes regarding the same and he shall ensure that the same is resolved and the

company, being the Corporate Debtor or its existing directors would not be put into any inconvenience.

6.6 It appears from the bank statements filed by the Financial Creditor that certain payments have been made to the Financial Creditor after the takeover of the corporate debtor which the present Board did not authorise. The present board of directors of the Corporate Debtor on coming to know about such payments being made were surprised to learn that the previous directors kept on operating the Bank Account as the authorised signatory without the knowledge of the present directors.

6.7 It has been submitted that there has been no agreement entered into by and between the applicant and the Corporate Debtor, for providing any purported interest on the amount of loan provided by the applicant, as claimed by the applicant nor has the Corporate Debtor acknowledged interest in any manner. The purported loan cannot be classified as financial debt under the Code as the same is without any time value of money and as much the instant petition is not maintainable and liable to be dismissed.

6.8 The Corporate Debtor has never acknowledged or admitted the loan amount in any manner and any part payment by the Corporate Debtor cannot be construed as admission of entire amount of loan and such the claim of the applicant, if any, is barred by the laws of limitation. The Corporate Debtor has also not made any payment of interest or deducted any TDS thereon. In any event, since the loan was provided by the applicant in the year 2014, and the Corporate Debtor has never acknowledged interest thereon in any manner, and as such the claim of the applicant against interest is barred by the laws of limitation.

6.9 It has been denied that the loan amount was disbursed as per any mutually agreed rate of interest. There has been no agreement between the parties with regard to the rate of interest, nor has the Corporate Debtor ever paid any interest or deducted any TDS thereon, or

acknowledged the interest component in any manner in the said loan provided in the year 2014 by the applicant. As such, without any consideration for the time value of money and without any payment of interest or acknowledgement thereof by the Corporate Debtor, the said loan cannot be classified as financial debt under the Code and as such the petitioner herein cannot become Financial Creditor under the Code.

6.10 It is denied that the bank statements as annexed by the Financial Creditor reflect all transactions of repayment by the Corporate Debtor. The audited accounts of the Corporate Debtor does not disclose any admission of liability by the Corporate Debtor of the purported debt. Further, Balance Sheet cannot be construed as admission of liability. The purported audited accounts of the Financial Creditor do not disclose any amount to be payable by the Corporate Debtor to the Financial Creditor. Further, the document annexed at page 111 by the Financial Creditor, purporting to be an annexure to the audited accounts of the Financial Creditor appears to be fabricated. The same is neither a part of the audited accounts, nor is the same signed by the auditor of the Financial Creditor and the same has been produced in a fabricated manner belatedly to take wrongful action and abuse the process of law under the Code.

7 Supplementary Affidavit on behalf of the Corporate Debtor:

- 7.1 The Corporate Debtor has submitted that subsequent to filing the reply-affidavit, it came to the knowledge of the Corporate Debtor that several documents pivotal for the adjudication of the instant petition had not been annexed with the reply affidavit. Therefore, the instant supplementary affidavit has been filed by the Corporate Debtor, for introducing the said annexures to record.
- 7.2 The Corporate Debtor has further submitted that the balance sheets of the Financial Creditor which have been produced on record are visibly different

in content from the Financial Creditor's balance sheets as uploaded on the Ministry of Corporate Affairs (MCA) website. Therefore, the balance sheets in Annexures J and K of the instant petition is false and fabricated. Further, the said Balance Sheet at page 111 of the petition is not signed by the Auditor. The certified copies of the balance Sheets for the Financial Years 2016 to 2019 have been annexed to the supplementary affidavit and marked with letter "A".

7.3 Further, the auditor's note does not specify any loans or advances granted to the Corporate Debtor, which shall evidence absence of any such loans given to the Corporate Debtor at all. Further, no loan agreement or agreement for Inter Corporate Deposit has been executed between the parties.

7.4 Further, the amount of loan in the instant matter is more than the paid-up share capital and free reserve of the Financial Creditor, and the same is not allowed.

7.5 It is further submitted that on acquisition of the Corporate Debtor by the current directors, the erstwhile directors kept the new directors in dark about the purported loan.

7.6 Further, upon filing the reply affidavit in the instant matter, it has come to the knowledge of the Corporate Debtor that the erstwhile directors are colluding with the Financial Creditor to usurp the assets of the Corporate Debtor by filing the instant petition.

7.7 Further, no special board resolution ratifying any loan disbursement as been produced on record.

8 **Rejoinder on behalf of the Financial Creditor:**

8.1 The Financial Creditor has submitted that with regard to extending the ICD of ₹200 Lakh, the petitioner has submitted its bank statements as evidence, and the same have not been denied by the Corporate Debtor.

- 8.2 Further, the last payment was received on 27.02.2017 and the petition under section 7 was filed on 13.02.2020, which is within the limitation period. Further, the acknowledgment of debt in Balance Sheet of 2019 by the Corporate Debtor is construed to be within the Limitation Period as envisaged in section 18 of the Limitation Act.
- 8.3 The Corporate Debtor has admitted that the loan was taken by the erstwhile directors, without the knowledge of the current directors. Further, it has been admitted in the reply- affidavit that Mr. Sumit Agarwal, the erstwhile director had assured the new management that there were certain disputes pertaining to the loan. The said statement itself is sufficient to prove acknowledgement of debt by the Corporate Debtor and its current management.
- 8.4 The allegation that the Annexure J and K of the petition are fabricated are denied. The said documents are exactly the same as have been uploaded on the MCA website. Only page 111 of the petition is an additional page which was not uploaded on the MCA website. The said page is a detail sheet of various schedules annexed to the financial statements of the Financial Creditor. Such details were not required to be a part of the documents uploaded at the website of MCA, nor required to be countersigned by the auditors. However, a certificate from the statutory auditors who have signed the financial statements is attached to this rejoinder and marked as Annexure 1.
- 8.5 It has been alleged that the Auditor's Report does not specify any loans or advances granted to the Corporate Debtor. However, the said allegation is misconceived because the Auditor's report will report only those loans/ advances which violates the provisions of section 185 or 186. Since there was no violation by the Financial Creditor, no reporting was there from the auditors.
- 8.6 It is further submitted that the Financial Creditor has received only ₹70,00,000/- and not ₹1,29,00,000/- as claimed by the Corporate Debtor.

The amount of ₹59,50,000/- claimed to have been submitted by the Corporate Debtor has been submitted to an account with UCO Bank being account no. 17840210002254 which does not belong to the Financial Creditor. The said account belongs to one Kalinga Ferro Ispat Private Limited.

9 **Analysis and Findings:**

9.1 We have heard the Ld. Counsel for the Financial Creditor and the Ld. Counsel for the Corporate Debtor and perused the record.

9.2 On perusal of records, it can be seen that while an amount of ₹2,00,00,000/- was disbursed by the Financial Creditor to the Corporate Debtor on 07.02.2014, there are no documents to prove whether the said amount was disbursed as a loan or ICD to the Corporate Debtor. However, in para 3(v) of the reply affidavit, the Corporate Debtor has admitted to the taking of the loan by the erstwhile director, albeit without the knowledge of the current directors cum promoters. Para 3(v) of the reply affidavit has been reproduced hereinafter:

“ (v) It is pertinent to mention herein that the Corporate Debtor was taken over by the present directors in the year December, 2015 and the aforesaid payments to the financial creditor have been made by the previous director of corporate debtor Mr. Sumit Agarwal. The previous director of the Corporate Debtor did not disclose the aforesaid loan provided by the financial creditor to the present directors of the Corporate Debtor at the time of takeover. Infact, the present directors of the Corporate Debtor did not have any clue regarding the existence of the purported loan till the time the corporate debtor received a notice from the financial creditor demanding repayment thereof. The corporate debtor was shocked to receive the said demand notices and immediately contacted the previous director Mr. Sumit Agarwal. The said Mr. Sumit Agarwal assured to the corporate debtor that there are certain disputes regarding the same and he shall

ensure that the same is resolved and the company, being the Corporate Debtor or its existing directors would not be put into any inconvenience.”

9.3 The same has also been admitted by the Corporate Debtor in para 9 and 14 of its supplementary affidavit.. Further, repayments have been made by the Corporate Debtor to the bank account of the Financial Creditor. As such, it can be concluded that a financial debt does exist in favour of the Financial Creditor from the Corporate Debtor.

9.4 The Corporate Debtor has contended that the instant petition is barred by limitation. Regarding the payments made to the Financial Creditor after 2015 *i.e* after the takeover of the Corporate Debtor, the Corporate Debtor has contended that the said payments were made by the erstwhile directors by operating the accounts of the Corporate Debtor without the knowledge of the present board of directors. Even if the said contention is taken to be true, the same is a matter of internal management and will not put an end to the Corporate Debtor's liability towards the Financial Creditor. The disputed payments were made in 15.10.2016, 23.02.2017 and 27.02.2017. According to section 19 of the Limitation Act, 1963, when payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period of limitation, by the person liable to pay the debt or legacy or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made. Therefore, taking into account the said dates, the petition is well within the period of limitation.

9.5 The Corporate Debtor has also contended that actual payments have already been made by the Corporate Debtor. The bank statements produced by the Corporate Debtor show that a total amount of ₹1,29,50,000/- has been repaid by the Corporate Debtor between the period of 10.12.2015 upto 27.12.2017. the same has been rebutted by the Financial Creditor who has claimed that apart from the admitted sum of ₹70,00,000/- the rest of the amounts have

not been credited to the account of the Financial Creditor by to a third party being Kalinga Ferro Ispat Pvt. Ltd.

9.6 Without going into the merits of the abovementioned contentions of both the parties, we would like to hold that even if the Corporate Debtor's contention is taken to be true, the Corporate Debtor has still defaulted in the repayment of ₹70,50,000/-. Since the petition has been filed on 11.02.2020, the said amount alone would be above the pecuniary threshold for the relevant time *i.e* rupees one lakh. Therefore, the instant petition is maintainable and the Corporate Debtor has indeed defaulted in its repayment.

9.7 According to the Corporate Debtor, the documents annexed as Annexure J and K are false and fabricated. The Corporate Debtor has contended that the document on page 111 of the petition is an additional page which is not uploaded at the MCA website. It is noted that the purported document is a detail sheet of various schedules annexed to the financial statements of the Financial Creditor. The said document is not required to be uploaded to the MCA website.

9.8 The Financial Creditor in this regard has attached a certificate from the statutory auditors who have signed the financial statements on page 13 of the Rejoinder certifying that the particulars contained in the document on page 111 are true and correct. In light of the same, the Corporate Debtor's contention are not tenable.

9.9 In regard to the initiation of CIRP in case of section 7 petitions, we would like to refer to the decision of the Hon'ble Supreme Court in the matter of ***Innoventive Industries Ltd Vs. ICICI Bank and Ors.***¹ wherein it was held that:

"...The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of

¹ MANU/SC/1063/2017 – decided on 31.08.2017

receipt of a notice from the adjudicating authority. Under Sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.” (Para 28)

9.10 The Apex Court, in the matter of *Innoventive* (*supra*), further held that:

“On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.” (Para 30)

9.11 In light of the above facts and circumstances, this adjudicating Authority is satisfied that there exists a financial debt, due from the Corporate Debtor to the Financial Creditor and the Corporate Debtor has defaulted in the repayment of the same. Further, the petition is complete in all respects. Therefore, keeping in view the above-mentioned judgment, this Adjudicating Authority is satisfied the instant petition should be admitted.

9.12 It is, accordingly, hereby ordered as follows: -

- a) The application bearing **CP (IB) No. 488/KB/2020** filed by **Nilkanth Dealcom Private Limited** (Financial Creditor), under section 7 of the Code read with rule 4(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against **Fairdeal Vintrade Private Limited** , CIN: U51109WB2008PTC127806, the Corporate Debtor, is **admitted**.
- b) There shall be a moratorium under section 14 of the IBC.
- c) The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the

resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.

- d) Public announcement of the CIRP shall be made immediately as specified under section 13 of the Code read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- e) **Mr. Rasik Singhania**, registration number **IBBI/IPA-001/IP-P00390/2017-18/10708**, email: **rasik.singhania@gmail.com** is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the Code subject to submission of a valid Authorisation of Assignment in terms of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016. The fee payable to IRP or the RP, as the case may be, shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the Code.
- f) During the CIRP period, the management of the Corporate Debtor shall vest in the IRP or the RP, as the case may be, in terms of section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this Order, in default of which coercive steps will follow.
- g) The IRP/RP shall submit to this Adjudicating Authority periodical reports with regard to the progress of the CIRP in respect of the Corporate Debtor.
- h) The Financial Creditor shall deposit a sum of ₹ 3,00,000/- (Rupees Three lakh only) with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC).

- i) In terms of section 7(5)(a) of the Code, Court Officer of this Court is hereby directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the IRP by Speed Post, email and WhatsApp immediately, and in any case, not later than two days from the date of this Order.
- j) Additionally, the Financial Creditor shall serve a copy of this Order on the IRP and on the Registrar of Companies, West Bengal, Kolkata by all available means for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this order.

9.13 **CP (IB) No. 488/KB/2020** to come up on **31.10.2022** for filing the progress report.

9.14 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)

Signed on this, the 27th day of September, 2022

SM(LRA)