IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT-II

CP(IB) 490 (IB)2023
Under section 7 of the Insolvency and Bankruptcy Code, 2016

IN THE MATTER OF

Creative Plastics Ltd.
122, 11th Floor, Jolly Maker Apartment No. 3, Cuffe Parade Mumbai - 400005.

… Financial Creditor

V/s.

Rajesh Real Estate Developers Pvt. Ltd.
139, Seksaria Chambers, Nagindas Master Road, Fort, Mumbai - 400023.

… Corporate Debtor

Order delivered on :- 27.02.2024

Coram:

Hon'ble Shri Kuldip Kumar Kareer, Member (Judicial)

Hon'ble Shri Anil Raj Chellan, Member (Technical)

Appearances (through VC):

For the Financial Creditor	: Adv. Gyanika Kochar
For the Corporate Debtor	: Adv. Rohaan

ORDER

Per: - Kuldip Kumar Kareer, Member (Judicial)

1. This Company petition is filed by Creative Plastics Ltd. (hereinafter called "**the Petitioner**") seeking initiation of Corporate Insolvency Resolution Process (**CIRP**) against Rajesh Real Estate Developers

Pvt. Ltd. (hereinafter called "**Corporate Debtor**") alleging that the Corporate debtor committed default in making payment to the Petitioner. This petition has been filed by Financial Creditor invoking the provisions of Section 7 Insolvency and bankruptcy code, 2016 (hereinafter called "**Code**") on the ground that the Corporate Debtor has failed to make payment of a sum of Rs. 3,43,38,953/-.

<u>The submissions by the Financial Creditor: -</u>

2. The Corporate Debtor issued Confirmation of Accounts for the F. Y. 2018- 2019 admitting and acknowledging that it was due and liable to pay a sum of Rs. 6,81,18,750/- to the Financial Creditor as on 31.03.2019.

3. The Corporate Debtor issued the following Letters to finally renew the loans:

   a. Letter dt. 26.04.2019 assuring repayment of principal of Rs. 1,00,00,000/- and interest @ 15% p.a. along with Demand Promissory Note and PDC No.215596 dt. 01.07.2019, PDC No.215597 dt. 27.09.2019 and PDC No.215598 dt. 27.09.2019 for the Principal and interest amount.

   b. Letter dt. 12.08.2019 assuring repayment of principal of Rs. 1,00,00,000/- and interest @ 15% p.a. along with Demand Promissory Note and PDC No.773625 dt. 11.11.2019, PDC No.773626 dt. 07.02.2020 and PDC No.773634 dt. 07.02.2020 for the Principal and interest amount.

   c. Letter dt. 10.07.2019 assuring repayment of principal of Rs. 1,00,00,000/- and interest @ 15% p.a. along with Demand Promissory Note and PDC No.773602 dt. 17.10.2019, PDC

No.773603 dt. 15.01.2020 and PDC No.773605 dt. 15.01.2020 for the Principal and interest amount.

d. Letter dt. 09.07.2019 assuring repayment of principal of Rs. 1,00,00,000/- and interest @ 15% p.a. along with Demand Promissory Note and PDC No.773519 dt. 13.09.2019, PDC No.773520 dt. 13.12.2019 and PDC No.773583 dt. 13.12.2019 for the Principal and interest amount.

e. Letter dt. 12.08.2019 assuring repayment of principal of Rs. 1,00,00,000/- and interest @ 15% p.a. along with Demand Promissory Note and PDC No.773668 dt. 28.11.2019, PDC No.773669 dt. 26.02.2020 and PDC No.773670 dt. 26.02.2020 for the Principal and interest amount.

4. When the Cheques that were issued with the aforesaid Letters were deposited the same were returned dishonoured. The Corporate Debtor failed to repay the loan amount despite repeated reminders.

5. Since the Corporate Debtor was not able to honour its financial obligations, the Financial Creditor filed Company Petition No. 179/MB/2020 before the Hon'ble National Company Law Tribunal.

6. While the said Company Petition was pending, the Corporate Debtor approached the Financial Creditor for a settlement and the parties entered into Consent Terms dt. 03.09.2021 under which it was agreed that the Corporate Debtor would pay an aggregate sum of Rs 8,87,75,000/- in full and final settlement of the dues of the Financi Creditor and additionally pay TDS of Rs. 21,35,000/-. The Corporate Debtor paid a sum of Rs. 6,28,00,000/- vide Demand Draft No. 374990 09.08.2021 and undertook to pay the balance amount of 2,59,75,500/- as follows:-

Sr. No.	Amount	Mode of Payment
1.	Rs. 1,20,00,000/-	PDC dt. 20.09.2021 bearing no. 845131 drawn on Corporation Bank, Mahakali C.Rd-PBB Branch
2.	Rs. 1,25,00,000/-	Post dated Cheque, dated 31.08.2021 bearing no. 845132 drawn on Corporation Bank, Mahakali C.Rd- PBB Branch
3.	Rs. 14,75,500/-	Post dated Cheque, dated 20.09.2021 bearing no. 845134 drawn on Corporation Bank, Mahakali C.Rd- PBB Branch

7. The Corporate Debtor had agreed and undertaken to pay a sum of Rs. 1,25,00,000/- on 31.08.2021. However, it failed to do so and sought an extension of 15 days. In good faith, the said extension was granted however, despite the same, the Corporate Debtor failed to make payment and the Cheque issued by them was also returned dishonoured. Thus, the Financial Creditor got addressed Notice dt. 16.09.2021 calling upon the Corporate Debtor to comply with the default obligations as set out in the Consent Terms in the event they wanted the grace period to make payment.

8. Accordingly, the Corporate Debtor made payment of a sum of Rs. 7,50,000/- and sent Email dt. 17.09.2021 inter alia stating that they were in the process of arranging the funds and would make the payment.

9. In the meantime, the instalments of Rs. 1,20,00,000/- and Rs. 14,75,500/- became due on 20.09.2021. The Corporate Debtor once again failed to make payment and the Cheques issued by the Corporate Debtor in this regard were also returned dishonored. The Financial Creditor got addressed Notice dt. 22.09.2021 calling upon the Corporate Debtor to comply with the default obligations in case they wanted the grace period to make payment. However, they failed to respond to the same. Thus, the Financial Creditor got addressed Notice dt. 23.09.2021 categorically informing them that they were not entitled to the grace period for the instalments of Rs.

1,20,00,000/- and Rs. 14,75,500/- in view of their failure to comply with the default obligations.

10. The grace period of 1 month for the instalment of Rs. 1,25,00,000/- expired and thus the Financial Creditor got addressed Notice dt. 21.10.2021 calling upon the Corporate Debtor to either pay the said installment or comply with the default obligations in case they wanted a further extension. Despite receipt of the said Notice, the Corporate Debtor failed to comply with the requisition contained therein.

11. The Financial Creditor and its Group entities got addressed Notice 08.11.2021 to the Corporate Debtor inter alia cancelling the Consent Terms executed between the parties.

12. Thereafter when the captioned Petition was listed before the Hon'ble NCLT on 16.11.2021, the Corporate Debtor informed this Hon'ble Tribunal that they were facing certain financial difficulty and thus sought time to make payment. Despite the same they failed to make payment.

13. On 08.01.2022, the Corporate Debtor sent an E-mail requesting for time upto 24.01.2022 to make payment of the balance amount. Without prejudice to their rights, the Financial Creditor agreed to grant the extension vide Letter dt. 13.01.2022.

14. Once again, the Corporate Debtor failed to make payment. Financial Creditor thus got addressed Notice dt. 31.01.2022 inter alia informing the Corporate Debtor that since the Consent Terms had been vitiated due to their actions and they had no intention of settling the matter, the Financial Creditor would be proceeding legally against them.

15. The Corporate Debtor filed its reply before the Hon'ble Tribunal.

16. Financial Creditor filed an Additional Affidavit to bring on record the Consent Terms as directed by the Hon'ble Tribunal alongwith the aforesaid Letters and E-mails exchanged between the parties.

17. On 13.02.2023, the said Company Petition was heard when the Hon'ble Tribunal was pleased to pass an Order inter alia holding that a fresh cause of action had arisen under the Consent Terms for which a fresh Petition must be filed u/s. 7 of the Code on the basis of a fresh date of default. Hence this petition.

Reply on behalf of the Corporate Debtor:-

18. In reply the Corporate Debtor has denied all statements/submissions by the Petitioner in the present Petition stating that nothing in the said Petition should be deemed to be admitted for want of specific denial.

19. It is further stated that the Petitioner had filed CP No. 179 of 2020 before this Tribunal against the Corporate Debtor purporting to be a financial creditor for a sum of Rs. 7,51,20,833/-. The date of default was stated to be 22.11.2019. The Corporate Debtor craves leave to refer and rely upon the 2020 Petition as and when required.

20. In the Petition, to bring an amicable settlement to the disputes between the parties, the Corporate Debtor entered into Consent Terms dated 03.09.2021 with the Petitioner wherein the Corporate Debtor agreed to pay the Petitioner a sum of Rs. 9,09,10,500/- (including TDS).

21. The Petitioner received a total payment of Rs. 6,35,50,000/- from the Corporate Debtor under the Consent Terms.

22. Under the Consent Terms, the Petitioner was obligated to withdraw the 2020 Petition. However, the Petitioner failed to do so and continued to prosecute the 2020 Petition. Accordingly, this Hon'ble Tribunal was pleased to dismiss the said Petition by way of its order dated 13.02.2023. Now the Petitioner has filed the present Petition claiming to be a Financial Creditor for a sum of Rs. 3,43,38,953/-. The date of default has been stated to be 20.09.2021.

23. It is further stated by the Corporate Debtor that the present Petition is baseless and misconceived in law and deserves to be rejected outright for, inter alia, the following reasons which are without prejudice to each other and set up in the alternate.

24. It is pertinent to note that the financial debt claimed by the Petitioner in the 2020 Petition was only Rs. 7,51,20,833/-. The amount agreed to be paid in the Consent Terms was far greater than the debt claimed i.e. Rs. 9,09,10,500/-. As such, there was no correlation between the amount claimed and the amount stated in the Consent Terms. This amount was far greater than the Debt Amount claimed in the original Petition. In fact, it was in the nature of an amicable settlement arrived at between the parties without any correlation with the original transaction between the parties.

25. That being so, the amount agreed to be paid in the Consent Terms was in the nature of an ad-hoc settlement that had no underlying relationship with the Debt Amount claimed or the transaction between the parties. It was not the nature of a financial debt at all. It is therefore, evident that the amount claimed by the Petition is not a financial debt under the Code and the Petitioner is not a Financial Creditor under the Code.

26. Therefore, the present Petition deserved to be dismissed outright as it is completely fraudulent and malicious and has been filed with the ulterior objective of brow-beating the Corporate Debtor and extorting monies from the Corporate Debtor with no real intent of commencing the CIRP of the Corporate Debtor.

Analysis and Findings:-

27. We have heard the Counsel for the parties and have gone through the records.

28. Ld. Counsel for the Financial Creditor has argued that the Financial Creditor had advanced the loan of Rs. 9 crores to the Corporate Debtor by way of three tranches in the year 2015-2016. The Counsel for the Financial Creditor has further pointed out that sum of Rs. 3 crores was repaid between December, 2015 and February, 2016 and sum of Rs. 6 crores was outstanding. The loan facility was renewed from time to time. The Counsel for the Financial Creditor has further pointed out that the Corporate Debtor stopped serving the interest payments from 01.04.2018 onwards. Thereafter, the Corporate Debtor paid only a sum of Rs. 9,90,985/- on 30.08.2019 and the remaining amount was not paid. As a result, the Financial Creditor preferred CP(IB) 179 of 2020 before the NCLT. It has further been pointed out by the Counsel for the Financial Creditor that during the pendency of the said Company Petition, the Corporate Debtor entered into consent terms dated 09.09.2021, whereby Corporate Debtor agreed to pay the aggregated sum of Rs. 8,87,75,000/- towards the full and final settlement of the dues of the Financial Creditor along with the TDS of Rs. 21.35 lakhs. Subsequent to that, the Corporate Debtor paid the sum of Rs. 6.28 crores by demand draft dated 09.08.2021 and further under-took to pay the balance

amount of Rs. 2,59,75,500/- in three installments by way of postdated cheques of Rs. 1.20 crores dated 20.09.2021, Rs. 1.25 crores dated 31.08.2021 and Rs. 14,75,500/- also dated 20.09.2021. It was further agreed in the consent terms that if the cheques were dishonored, the amount will be paid as per the consent terms subject to payment of default penalty of Rs. 5 lakhs and Rs. 10 lakhs each.

29. The Counsel for the Financial Creditor has further argued that the Corporate Debtor made payment of only Rs. 7.50 lakhs. The Financial Creditor got sent notices dated 16.09.2021, 20.09.2021, 20.11.2021 and 08.11.2021 whereby the consent terms were cancelled on account of default committed by the Corporate Debtor and the present Petition was filed.

30. The Counsel for the Financial Creditor has further referred to the email dated 08.01.2022 sent on behalf of the Corporate Debtor admitting that the funds against the said post dated cheques of Rs. 2,59,75,000/- could not be arranged with the result that the cheques were dishonored and further the Corporate Debtor sought time till 24.01.2022 to make the payment of the entire outstanding amount. Therefore, according to the Counsel for the Financial Creditor nonpayment of outstanding dues as per the consent terms has given a sufficient cause of action to file the present Petition u/s 7 of the IB Code, 2016, which is liable to be admitted considering the fact that the outstanding dues has not been disputed or denied by the Corporate Debtor.

31. On the other hand, Ld. Counsel for the Corporate Debtor has argued that the present Company Petition is not maintainable considering the fact that any breach by not making payment as per the consent terms cannot be equated with a default of a financial debt. According

to the Counsel for the Corporate Debtor, the execution of the consent terms was altogether a new transaction which could not be equated with a financial debt. In this regard, the Counsel for the Corporate Debtor has further pointed out that vide notice dated 08.11.2021, the Financial Creditor cancelled and terminated the consent terms with immediate effect and that being so the contract, if any, came to an end and under the circumstances the remedy available with the Financial Creditor is to sue the Corporate Debtor for damages for breach of the consent terms and under no circumstances a Petition u/s 7 of the IB Code, 2016 can be maintained.

32. In support of his contention the Counsel for the Corporate Debtor has relied upon ***Priyal Kantilal Patel vs. IREP Credit Capital Pvt. Ltd. and Anr. (Company Appeal (AT)(Insolvency) No. 1423 of 2022 and IA 4457 of 2022)*** decided on 01.02.2023, whereby Hon'ble NCLAT has held that the non payment of outstanding dues as per the consent terms does not amount to financial debt. Counsel for the Corporate Debtor has further relied upon ***M/s Delhi Control Devices (P) Limited vs. M/s Fedders Electric and Engineering Ltd. in Company Petition (IB) No. 343/ALD/2018*** decided on 14.05.2019, whereby it was also held that the unpaid amount in the settlement agreement cannot be treated as financial debt u/s 7 of the IB Code, 2016. Counsel for the Corporate Debtor has also relied upon ***Amrit Kumar Agarwal vs. Tempo Appliances Pvt. Ltd. 2020 SCC Online NCLAT 1202*** decided on 25.11.2020, whereby it has been held that breach of terms of agreement including the settlement agreement whereunder payment may be due would not fall within the ambit of Section 5(8) so as to constitute a financial debt. It has further been relied upon by the Counsel for the Corporate Debtor in ***Brand Realty Services Ltd. vs. Sir John bakeries India Pvt. Ltd. 2020 SCC Online NCLT 6066*** decided on

22.07.2020, whereby also it was held by the NCLT that the settlement agreement is to settle the amount which according to the case of the Applicant was due in terms of the agreement dated 28.11.2014. It was further held that the present Application is not against the invoices raised in terms of agreement dated 28.11.2014. Rather it was a breach of terms and conditions of the account settlement agreement dated 15.06.2018 and, therefore, the same cannot be treated as Operation debt in terms of Section 5(21) of the Code. In the light of the law laid down in the afore cited cases, it has been urged by the Counsel for the Corporate Debtor that the present Petition deserves to be dismissed.

33. We have weighed the contentions raised by the Counsel for the parties and have gone through the records.

34. The only defence raised by the Counsel for the Corporate Debtor is that the outstanding dues claimed in the Petition u/s 7 of the Code, 2016 cannot be treated as a financial debt as the same emanate from the consent terms and not from any other loan transaction between the parties. However, in our considered view, the contention raised by the Counsel for the Corporate Debtor is not tenable. We have also gone through the case law cited by the Counsel for the Corporate Debtor which, in our considered view, cannot be applied to the facts and circumstances of the present case. In this regard a reference can be made to the law laid down in ***Priyal Kantilal Patel vs. IREP Credit Capital Pvt. Ltd. and Anr.*** (Supra) and also in ***Amrit Kumar Agarwal vs. Tempo Appliances Pvt. Ltd.*** (Supra) in the latter case, the Corporate Debtor was a Corporate Guarantor only and the settlement agreement was executed between the lenders and Principal Borrower and in that context, it was held that breach of terms of the settlement

agreement on the part of the Corporate Debtor/ Corporate Guarantor cannot be treated as financial debt.

35. So far as the law laid down in ***Priyal Kantilal Patel vs. IREP Credit Capital Pvt. Ltd. and Anr.*** (supra) is concerned, it was held therein that as per clause 9 of the consent terms, there was a clear stipulation that Financial Creditor shall be entitle to revive the Company Petition which was previously withdrawn in the light of the settlement agreement executed between the parties. It was further held that merely because instead of reviving of Company Petition, a fresh Company Petition was filed u/s 7 of the Code, 2016 should not be a reason to reject the Company Petition or not to entertain such Company Petition. In the instant case also, as per the clause 8 of the consent terms, if the Corporate Debtor continues to remain in default of the payment schedule set out in the consent terms, the Financial Creditor shall have liberty to apply for the revival of the Company Petition. Merely because the Petitioner has filed a fresh Petition instead of reviving the previously filed Petition, cannot be a reason to reject the Company Petition as held by the Hon'ble NCLAT in ***Priyal Kantilal Patel vs. IREP Credit Capital Pvt. Ltd. and Anr.*** (Supra). Similarly, the contention that in part IV of the Petition, the debt is stated to be due under the consent terms cannot be taken to mean that the debt in question is not a financial debt when there is no dispute with regard to the fact that the previous Petition was filed u/s 7 of the Code, 2016 in respect of a default of financial debt. It is further worth pointing out that in Part V of the Petition has not only referred to the previous Petition i.e. CP(IB) 179(MB)2020 and has also annexed the copy of the said Petition as Exhibit F. The Part IV of the Petition cannot be read in isolation and therefore, it cannot be said that the present Petition has been filed only on the basis of the

consent terms. Besides, merely with the execution of the consent terms, the nature of the financial debt cannot be said to have changed. Therefore, in our considered view, the Petitioner cannot be non-suited on the ground that the second Petition has been filed by him only on the basis of default of consent terms. Rather, in our considered view, if the arguments advanced by the Corporate Debtor is accepted, it shall tantamount to giving premium to the Corporate Debtor who has undisputedly breached the consent terms, as has also been observed in ***Priyal Kantilal Patel vs. IREP Credit Capital Pvt. Ltd. and Anr.*** (Supra) case.

36. No other points have raised on behalf of the Corporate Debtor even otherwise, on the basis of the documents placed on record by the Financial Creditor, the factum of assistance of financial debt and its default stands proved on record. Therefore, in our considered view, it is a fit case for admission u/s 7 of the Insolvency and Bankruptcy Code, 2016. It is ordered accordingly in the following terms:

<u>ORDER</u>

a. **The above Company Petition No. (IB) - 490(MB)/2023 is hereby admitted** and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against **Rajesh Real Estate Developers Pvt. Ltd.**

b. This Bench hereby appoints **Mr. Shouvik Kumar Roy**, Registration No**: IBBI/IPA-001/IP-P02113/2020-2021/13284** as the Interim Resolution Professional having registered office at E 502 Raheja Heights, Gen. A K Vaidya Marg, Dindohsi, Malad (East), Mumbai - 400097, email :- shouvikkumarroy@gmail.com, and Mob. No. 9223056223 to carry out the functions as mentioned under the Insolvency & Bankruptcy Code, 2016.

c. The Financial Creditor shall deposit an amount of Rs. 3 Lakhs towards the initial CIRP cost by way of a Demand Draft drawn in favour of the Interim Resolution Professional appointed herein, immediately upon communication of this Order.

d. That this Bench hereby prohibits 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; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover 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; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.

e. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.

f. That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

g. That the order of moratorium shall have effect from the date of pronouncement of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub- section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.

h. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.

i. During the CIRP period, the management of the Corporate Debtor will vest in the IRP/RP. The suspended directors and employees of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.

j. Registry shall send a copy of this order to the concerned Registrar of Companies for updating the Master Data of the Corporate Debtor.

Accordingly, this Petition is admitted.

The Registry is hereby directed to communicate this order to both the parties and to IRP immediately.

Sd/-

ANIL RAJ CHELLAN
Member (Technical)

Sd/-

KULDIP KUMAR KAREER
Member (Judicial)

ANKIT