IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA

CP(IB) No1786/KB/2019

Petition under section 7(1) 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:

Smt. Vrinda Karnani [PAN ANVPK7877P], wife of Sri Jitendra Karnani, working at Crescent Chamber, 4th Floor, Tamarind Lane, Fort, Mumbai-400023

.....Financial Creditor

-Versus-

Vindhya Industries Private Limited, a company incorporated under the Companies Act, 1956 and being a Company within the meaning of the Companies Act, 2013, and having Corporate Identification No-U74999WB1994PTC062884 and its registered office at P- 32, Kasba Industrial Estate, Phase- I, Kolkata- 700012 in the State of West Bengal.

.... Corporate Debtor

Date of Hearing : 11th May, 2021

Date of pronouncing the order: 14th July 2022

Coram:

Shri Rohit Kapoor, Member(Judicial)

Shri Harish Chander Suri, Member(Technical)

Appearances (via video conferencing):

For the Financial Creditor	:	Mr. Shaunak Mitra, Advocate
		Mr. Suryaksh Manot, Advocate
For the Corporate Debtor	:	Mr. Rishav Banerjee, Advocate
		Mr. Patita Paban Bishwal, Advocate

ORDER

Per :Rohit Kapoor, Member (Judicial):

1. This Court convened through video conferencing.
2. This Company Petition under section 7(1) of the Insolvency and Bankruptcy Code, 2016 (Code) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 , has been filed by **Smt. Vrinda Karnani** (hereinafter referred to as the Financial Creditor), seeking to initiate Corporate Insolvency Resolution Process (CIRP) against **Vindhya Industries Private Limited** (hereinafter referred to as the Corporate Debtor).

3. ***Submissions on behalf of the Financial Creditor:***

3.1 The case of the Financial Creditor is that the Financial Creditor, disbursed an amount of Rs. 20,00,000/- to the Corporate Debtor, as a loan in two tranches. The first tranche of disbursement was of an amount of Rs. 13,00,000/- by way of a cheque on 14/09/2009. The second tranche was for an amount of Rs. 7,00,000/- by way of a cheque on 31/03/2010. A copy of the of the Financial Creditor's bank statements evidencing the abovementioned disbursals is annexed to the petition as Annexure 'B'.

3.2 The said loan was disbursed to the Corporate Debtor on account of the proprietorship business carried on by the Corporate Debtor in the name and style of The Mining & Engineering Corporation. The fact that the Corporate Debtor is the proprietor of the said concern will appear, inter alia, from the financial statement of the Corporate Debtor filed with ROC for FY2017-18, a copy whereof is collectively annexed to the petition and marked with letter "C".

3.3 It was agreed and understood between the parties that the aforesaid loan amounts would be repayable by the Corporate Debtor on demand made by the Financial Creditor and there was no fixed time for repayment of

the said amount. It was also agreed and understood between the parties that the loan amount would carry interest at the rate of 9% per annum and that the interest amount would be paid to the Financial Creditor from time to time.

3.4 The aforesaid agreement and understanding between the parties regarding the loan transaction is evidenced by the conduct and course of dealings between the parties.

3.5 The Corporate Debtor had, from time to time paid interest at the agreed rate of 9% per annum on the loan amounts to the Financial Creditor till 31/05/2015. Thereafter, upon mutual consent the rate of interest was revised and enhanced to 12% per annum. The last of such payments was made on 30/09/2016, as will appear from the relevant extract of bank statements of the Financial Creditor which is annexed to the petition and marked with letter "D".

3.6 A schedule indicating particulars of the part payments on account of interest made by the Corporate Debtor from time to time is annexed to the petition and marked with letter "E". The Corporate Debtor has also issued written confirmation of accounts relating to the transactions between the parties, copies whereof are annexed to the petition and marked with letter "F".

3.7 The Corporate Debtor has also deducted Tax at Source on the amounts payable to the Financial Creditor, copies of the relevant forms and certificates evidencing the same are collectively annexed hereto and marked with letter “G”.

3.8 After adjusting for all payments made by the Corporate Debtor from time to time as on 31/08/2019, a total sum of Rs.15,89,632/- remains due and payable as unpaid financial debt by the Corporate Debtor to the Financial Creditor as per the following particulars:-

a) Principal outstanding of Rs. 4,60,188/-;

b) Interest @ 9% per annum calculated till 31/03/2015 on the outstanding principal amount being a sum of Rs. 5,17,069/-;

c) Interest @ 12% per annum calculated from 01/04/2016 till 31/08/2019 on the outstanding principal amount being a sum of Rs. 6,12,375/-.

3.9 The date from which the financial debt fell due is 30/09/2016 and the default is continuing on a day to day basis. No part of the outstanding financial debt is barred by limitation.

4 Part I of the petition contains the details of the applicant.

5 Part II of the petition contains the details of the Corporate Debtor.

6 Part III of the petition provides the particulars of the proposed Interim resolution Professional.

7 Part-IV contains particulars of Financial Debt. In item 2 of this part the amount claimed to be in default is mentioned.

8 Part-V contains the particulars of financial debt.

9 ***Submissions on behalf of the Corporate Debtor:***

9.1 The Corporate Debtor has submitted that there is no privity of contract between the Financial Creditor and M/s. Vindhya Industries Pvt. Ltd. The amount of Rs.20,00,000/- was disbursed by the Financial Creditor to M/s. The. Mining and Engineering Corporation, which is a sole proprietorship firm and not to the Corporate Debtor. Such disbursement to the M/s. The Mining and Engineering Corporation will be evident from page 16 of the said application. As such the aforementioned debt is due from the said M/s. The. Mining and Engineering Corporation to the Financial Creditor, and not from the Corporate Debtor herein.

9.2 Further, no interest has ever been paid by the Corporate Debtor to the Financial Creditor till date and, as such, this instant application is liable

to be dismissed at the very threshold as there is no financial debt vis-à-vis the Financial Creditor and the Corporate Debtor.

9.3 As per Section 3(7) of the Code, "Corporate Person" means a company has defined in section 2(20) of the Companies Act, 2013, a limited liability partnership, as defined under Section 2 of the Limited Liability Partnership Act, 2008 or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider. Thus, M/ s. The Mining and Engineering Corporation, which is a sole proprietorship firm cannot be a "Corporate Person" within the meaning of "Corporate Person" under IBC, 2016. As such, M/s. The Mining and Engineering Corporation cannot be a corporate debtor under IBC, 2016 and no application under section 7 or section 9 of IBC, 2016 will be maintainable against M/s. The Mining and Engineering Corporation.

9.4 The Financial Creditor has purportedly attempted to file an application under section 7 against the Corporate Debtor without any basis whatsoever and on the basis of the fact that the Corporate Debtor is the sole proprietor of M/s. The Mining and Engineering Corporation, which is a sole proprietorship firm. However, I say that since at the very first place an application under section 7 of the IBC, 2016 cannot be filed against M/s. The Mining and Engineering Corporation, which is a sole proprietorship firm as it is not a "Corporate Person" under IBC, 2016, no application under section 7 of IBC, 2016 can be filed against the Corporate Debtor in capacity of it being a sole proprietor of the M/ s. The Mining and Engineering Corporation.

9.5 The purported Corporate Debtor herein and the M/s. The Mining and Engineering Corporation are two different legal and/or separate entities.

9.6 The claims made by the Financial Creditor are ex facie barred by limitation. The Financial Creditor has incorrectly stated that

payments have been made by the Corporate Debtor from time to time as on 31st August, 2019.

9.7 The Financial Creditor has mischievously and surreptitiously filed the instant petition, simply in order to extort money out of M/ s. Vindhya Industries Pvt. Ltd. with a sole intention to make recovery of its investment in the business of M/s. The Mining and Engineering Corporation, which is not permissible under IBC, 2016. The purported Corporate Debtor herein has craved for leave to file an appropriate application under Section 65 of the IBC, 2016 against the Financial Creditor for maliciously filing the instant application under Section 7 of the IBC, 2016 without having any intention to initiate Corporate Insolvency Resolution Process.

9.8 There is no financial debt due from the Corporate Creditor and, as such, there is no default and this instant application is liable to be dismissed at the very threshold.

9.9 The Financial Creditor along with her family members, namely, Sri Maganlal Daga, who was the father of the Financial Creditor along with Sri Jagmohan Daga and Rajesh Kumar Daga, had made an investment in M/s. The Mining and Engineering Corporation in the year 2005 for the purpose of executing the project floated by Reliance Communications Ltd. and its subsidiaries. Thereafter a family arrangement was arrived at and pursuant to the family arrangement, all the family members including the Financial Creditor had made investments in M/s. The Mining and Engineering Corporation to successfully execute the project floated by Reliance Communications Ltd. and its subsidiaries. In this connection, documents evidencing the fact that M/s. The Mining and Engineering Corporation, which is a sole proprietorship firm executed projects floated by Reliance Communications Ltd. and its subsidiaries are annexed to the Reply Affidavit as Annexure “B”.

9.10 M/ s. The Mining and Engineering Corporation has already filed its claim in the insolvency proceeding of Reliance Communications Ltd., which further proves the fact that M/s. The Mining and Engineering Corporation had executed work pursuant to the investment by the applicant/ Financial Creditor in the M/s. The Mining and Engineering Corporation. It was expressly agreed between the said family members that the investments made by the applicant/ Financial creditor and her late father as well as the cousin brothers would not be treated as loan and the same shall be treated as investment only and the profit and loss of the said joint venture shall be shares between the family members which including the applicant/Financial. Creditor. The applicant is completely aware of the said family arrangement and has deliberately suppressed such facts from this Hon'ble Tribunal. Copy of the Memorandum of Understanding (MOU) dated 1st April, 2009 is annexed herewith and marked as Annexure "C".

9.11 The fact that it was a family arrangement will be established from the fact that the amount of Rs.20,00,000/- was disbursed by the Financial Creditor to M/s. The Mining and Engineering Corporation in 2009. If there was no family arrangement and it was a loan, the Financial Creditor would have asked for repayment of such loans much earlier. The fact that the Financial Creditor waited for almost 10 years to make purported recovery of the investments made by the Financial Creditor in M/s. The Mining and Engineering Corporation shows that the applicant/ Financial Creditor was eventually waiting for the returns/profits of the investments made by the Financial Creditor.

9.12 The Corporate Debtor has never given any balance confirmation statement to the Financial Creditor and therefore denies and disputes the purported balance confirmation statements and confirmation of accounts annexed by the applicant as annexure "F" to the said petition.

9.13 Further, the Corporate Debtor herein disputes Annexure "E" to the said petition, which is a purported schedule indicating part payment made to, the applicant/ Financial Creditor. No payment whatsoever has ever been made by the Corporate Debtor to the Financial Creditor, which explicitly proves the fact that there is no privity of contract between the purported Corporate Debtor and Financial Creditor. The Financial Creditor is strictly called upon to prove that payments have been made by the Corporate Debtor to the Financial Creditor.

9.14 It is now a well settled proposition of law that the proceedings under section 7 and 9 of the Code are not recovery proceedings, but a tool to resolve insolvency of Corporate Debtor. In the instant matter, the Corporate Debtor is a solvent and profit making company having no creditors. The same will be reflected from the balance sheets of the Corporate Debtor, a copy whereof is annexed to the Reply- Affidavit as Annexure "D".

10 Rejoinder on behalf of the Financial Creditor:

10.1 It has been submitted that the allegations made in the affidavit are baseless and contradictory. The corporate debtor has also resorted to fraudulent fabrication and forgery of documents in an attempt to avoid repayment to the applicant.

10.2 Bimal Kumar Daga is put to strict proof of the allegation that he is a Director of the corporate debtor or that he is competent or authorized to make or affirm this affidavit on behalf of the corporate debtor or that he is aware of the facts of the case. No valid authorisation whatsoever has been disclosed with the affidavit.

10.3 It is a matter of record that the corporate debtor carries on business, inter alia, as proprietor in the name and style of "The Mining and Engineering Corporation". This will appear, inter alia, from the statutory returns and financial statements filed by the corporate debtor with the Registrar of Companies, copies whereof are disclosed in the application.

10.4 There is no bar for a company within the meaning of the Companies Act, 2013 to be a proprietor of a proprietorship concern. A company in India is a juristic entity having perpetual succession and common seal and is a person competent to carry on business as and to be the proprietor of a proprietorship concern. In order to mislead this Adjudicating Authority, it has been wrongly alleged that the Corporate Debtor has a separate legal entity from that of the proprietorship concern by the name of "The Mining and Engineering Corporation". Such allegation is untenable as a proprietorship concern has no separate juristic existence apart from that of the proprietor which in the instant case is the corporate debtor.

10.5 In the circumstances, since the corporate debtor is admittedly the proprietor of the proprietorship concern in question, the corporate debtor carries full responsibility to discharge all obligations and to meet all liabilities of the proprietorship concern. The debt can only be owed by the proprietor of the proprietorship firm to the financial creditor.

10.6 There is privity of contract between the applicant and the corporate debtor as stated in the application and all allegations to the contrary are denied and disputed.

10.7 The computation showing the entire part payments made by the corporate debtor from time to time with the last part payment being made on 14 February 2012 has been annexed to the Rejoinder as Annexure “A”. Additionally, payments have also been made in the form of TDS deposits, the last of which was made on 30 September 2016.

11. Analysis and Findings

11.1 Heard the Ld. Counsel for the Financial Creditor and the Ld. Counsel for the Corporate Debtor and perused the records.

11.2 The first issue before us is whether the Corporate Debtor herein, being the proprietor company of the proprietorship firm being The Mining & Engineering Corporation can be proceeded against for the liabilities incurred by the said proprietorship firm. In this regard, we would like to

rely on the Hon'ble Supreme Court's decision in **Amway India Enterprises Pvt. Ltd. vs. Ravindranath Rao Sindhia and Ors.** [MANU/SC/0142/2021], wherein, while making it clear that that the consortium could not be allowed to rely upon their status as independent entities while dealing with MMRDA, the Apex Court held that:

"15. By way of contrast, we have seen how the Respondents have themselves applied to become distributors of Amway products in India as a sole proprietorship concern under the relevant forms issued by the Appellant, read with the Code of Ethics referred to hereinabove. In Ashok Transport Agency v. Awadhesh Kumar, MANU/SC/0675/1998 : (1998) 5 SCC 567, this Court has clearly held that a sole proprietary concern is equated with the proprietor of the business as follows:

6. A partnership firm differs from a proprietary concern owned by an individual. A partnership is governed by the provisions of the Indian Partnership Act, 1932. Though a partnership is not a juristic person but Order XXX Rule 1 Code of Civil Procedure enables the partners of a partnership firm to sue or to be sued in the name of the firm. A proprietary concern is only the business name in which the proprietor of the business carries on the business. A suit by or against a proprietary concern is by or against the proprietor of the business. In the event of the death of the proprietor of a proprietary concern, it is the legal representatives of the proprietor who alone can sue or be sued in respect of the dealings of the proprietary business. The provisions of Rule 10 of Order XXX which make applicable the provisions of Order XXX to a proprietary concern, enable the proprietor of a proprietary business to be sued in the business names of his proprietary concern. The real party who is being sued is the proprietor of the said business. The said provision does not have the effect of converting the proprietary business into a partnership firm.

The provisions of Rule 4 of Order XXX have no application to such a suit as by virtue of Order XXX Rule 10 the other provisions of Order XXX are applicable to a suit against the proprietor of proprietary business "insofar as the nature of such case permits". This means that only those provisions of Order XXX can be made applicable to proprietary concern which can be so made applicable keeping in view the nature of the case."

In light of the above precedent, we are of the view that the proprietor and the proprietorship firm herein cannot be deemed to be separate entities and the Corporate Debtor, being the proprietor will be liable to clear the dues of the proprietorship concern.

11.3 The second issue to be decided upon is whether a petition under section 7 of the Code can be filed against the Corporate Debtor herein, for the debt due from a proprietorship concern. Regarding this issue we would like to refer to sections 2(f) of the code which makes it clear that the Code, including Part II of the Code shall apply to proprietorship firms. Further, under section 3(8) of the Code, the Corporate Debtor means a corporate person who owes a debt to any person. In the instant case, the Corporate Debtor, in its role as a proprietor, owes the debt incurred by The Mining & Engineering Corporation, towards the Financial Creditor. Further, while the definition of "corporate person" under section 3(7) of the Code does not include proprietorship firms, in the instant case, the Corporate Debtor is a company as defined under section 2(20) of the Companies Act, 2013. Therefore the instant petition against the Corporate Debtor is maintainable in this regard.

11.4 The Corporate Debtor has further contended that the instant petition is not maintainable in light of the MOU dated 1/04/2009 between the two directors of the Corporate Debtor and Shri Magan Lal Daga. On perusal of the said MOU, it can be seen that while the Financial Creditor herein

is mentioned as the daughter of the first party of the said MOU, the Financial Creditor herself is not a party thereof. The MOU has not been signed by the Financial Creditor. Further, the amount mentioned to be transferred by the Financial Creditor therein is different from the amount which is the subject matter of this petition. Therefore, the said MOU cannot be deemed to extend to the Financial Creditor herein and as such, the contention of the Corporate Debtor regarding the same is not maintainable.

11.5 The date of default mentioned in the petition is 30.09.2016. The instant petition has been filed on 27/09/2019. The Corporate Debtor has acknowledged the debt by means of confirmation of accounts till 1.04.2019. period. Further, the Corporate Debtor herein has deducted Tax deducted at Source (TDS) on the amounts payable to the Financial Creditor. As such, the instant petition is within limitation. Further, such acknowledgments on part of the Corporate Debtor will also be deemed to be admission of debt due on its part.

10.8 Keeping in view that a default in the payment of a financial debt has occurred by the Corporate debtor, and there is an acknowledgment of Financial Debt and also that the said application is not barred by limitation, we are of the view that the instant application under section 7 of the Code is complete in all respects.

11. It is, accordingly, hereby ordered as follows: -

a) The application bearing **CP (IB) No. 1786/KB/2019** filed by **Smt. Vrinda Karnani** (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 **Vindhya Industries Private Limited**, CIN: U74999WB1994PTC062884, 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) **Shri Bimal Kanti Choudhary**, registration number **IBBI/IPA-001/IP-P01028/2017-18/11682**, email: **bimalkantichoudhury@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 Rs. 2,00,000 (Rupees Two 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 Finanical 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. **CP (IB) No. 1786/KB/2019** to come up on **29 August 2022** for filing the periodical report.

10. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Harish Chander Suri
Member (Technical)

Rohit Kapoor
Member (Judicial)

Signed on this, the 14th day of July, 2022

SM[LRA]