In the National Company Law Tribunal
Mumbai Bench.

No. C.P.(IB)-2826/(MB)/2018

Under Section 7 of Insolvency & Bankruptcy Code, 2016

In the matter of

Welspun Steel Ltd. : Petitioner/ Financial Creditor

V/s

Kalisma Steel Pvt. Ltd. : Respondent/ Corporate Debtor

Heard on: 10.07.2019
Order delivered on: 22.07.2019

Coram:

Hon'ble Shri M.K. Shrawat, Member (Judicial)

For the Petitioner(s) : 1. Mr. Aniruddh Gambhir, Advocate.

For the Respondent(s) : 1. Mr. Aneesh Dixit, Advocate.

Per M.K. Shrawat, Member (Judicial).

ORDER

1. A Petition u/s.7 has been submitted in Form No.1 on 18.07.2018 by the **Financial Creditor M/s. Welspun Steel Ltd.**, against the **Corporate Debtor M/s. Kalisma Steel Pvt. Ltd.**, Andheri (West), Mumbai-400053 for a Financial Debt amount of ₹3,50,00,000/- (Rupees Three Crores, Fifty Lakhs only) Plus Interest of ₹25,75,616/- (Twenty Five Lakhs, Seventy Five Thousand Six Hundred Sixteen only), calculated till 02.07.2018.

Submissions from the side of the Petitioner/ Financial Creditor :-

2. The Petitioner submitted that on 23.10.2017, the Corporate Debtor Company passed a Resolution in its meeting of the Board of Directors that *"the company will borrow sum of Rs.3,50,00,000/- from M/s. Welspun Steel Limited by way of ICD with the interest @ 15% per annum from the date of borrowing and execute the necessary documents as stated above*." Mr. Rahul Suri (Pledger, Personal Guarantor, Authorised Signatory and Director of Corporate Debtor Company) was authorized to execute such documents on behalf of the Company and affix the common seal of the

company on the documents as may be required. Accordingly, the Corporate Debtor (Borrower) approached the Financial Creditor. At request of the Borrower (i.e. Respondent Debtor), the Financial Creditor disbursed an amount of ₹3,50,00,000/- (Rupees Three Crores, Fifty Lakhs Only) on 27.10.2017 to the Corporate Debtor towards Short Term Working Capital, pursuant to an **Inter Corporate Deposit Agreement** ("**ICD Agreement**") dated 26.10.2017. A copy of the said ICD Agreement is on record. The Petitioner/ Financial Creditor has submitted that, as per para 3.1 of the ICD Agreement, the interest rate payable till the Repayment Date (90 days from the date of the Inter Corporate Deposit Agreement) i.e. 24.01.2018, was **15%** per annum amounting to ₹12,94,521/- (Rupees Twelve Lakhs, Ninety Four Thousand Five Hundred Twenty One only). As per Clause 3.2 of the said ICD Agreement, the default interest rate post 24.01.2018 (*supra*) was **2% more**, i.e. **17% per annum** till the date of default amounting to ₹25,75,616/- (Rupees Twenty Five Lakhs, Seventy Five Thousand Six Hundred Sixteen only), calculated up to 02.07.2018.

2.1. Following documents were executed as Collaterals/ Security:-

(a) Agreement for pledge of shares dated 26.10.2017 executed inter-alia between Mr. Rahul Suri ("Pledger"), pledging 1,00,00,000 equity shares of ₹10/- each aggregating to 10.66% of the paid-up equity share capital of the Borrower;

(b) Demand Promissory Note dated 26.10.2017 executed by the Corporate Debtor in favour of the Financial Creditor for the sum of ₹3,50,00,000/-together with interest @ 15% p.a.

(c) Personal Guarantee dated 26.10.2018 executed by Mr. Rahul Suri (as Guarantor) in favour of Financial Creditor.

(d) Post-Dated Cheques bearing No.751133 & 751134, both dated 27.04.2018 issued by the Promoter and Director of the Corporate Debtor, viz. Mr. Rahul Suri for the Principal amount of ₹3,50,00,000/- and for the Interest amount of ₹11,65,086/-.

2.2. Bank Certificate dated 12.07.2018 evidencing the Debt, issued by Federal Bank, Fort Branch, is on record, reproduced below:-

"Date: 12-07-2018

To whomsoever it may concern

This is to certify that an amount of Rs.3,50,00,000/- (Three Crore Fifty Lakhs) was debited to the current account 10990200085306 of M/s. Welspun Steel Ltd on 27-10-2017 for making RTGS to the account number 00198640000239 of the beneficiary M/s Kalisma Steel Pvt Ltd with HDFC Bank.

We also confirm that an amount of Rs.11,81,250/- (Eleven Lakh Eighty one thousand two hundred and fifty rupees) was credited to current account 10990200085306 of M/s Welspun Steel Ltd on 23-02-2018 received through NEFT from Kalisma Steel Pvt Ltd account with Punjab National Bank."

2.3. The cheques No.751133 & 751134 mentioned *supra* were allegedly presented for payment by the representative of the Financial Creditor to their Banker, Federal Bank, Lower Parel Branch, for encashment on 27.04.2018. **Both the cheques were however** stated to have **returned to the Financial Creditor** vide Cheque Return Memo's dated 30.04.2018 with remarks "**exceeds arrangements**". It is also informed that proceedings under Section 138 of the Negotiable Instruments Act, 1881 were initiated against the Corporate Debtor.

2.4. As a consequence, the Petitioner/ Financial Creditor issued Demand Notices dated 03.04.2018 and 24.05.2018 and requested the Corporate Debtor to make immediate payment of the above dishonoured cheques. However, the Debt amount has not been paid so far.

<u>Submissions from the side of the Respondent/ Corporate Debtor</u> :-

3. The Corporate Debtor vide its Reply filed on 12.03.2019 has denied all the contentions, submissions and allegations of the Petitioner and stated that the Petition is not maintainable since it presented complex matrix of facts which were disputed by the Corporate Debtor. The Corporate Debtor alleged that the Financial Creditor had filed the impugned Petition without any due 'authority' and hence illegal and argued that Ms. Chiniwalla is not authorized to affirm the said Petition under any pretext.

3.1. The Corporate Debtor argued that as per requirements of section 186 of the Companies Act 2013, the Financial Creditor is also required to demonstrate that the necessary Board Resolution was passed in that respect by the Financial Creditor approving such grant of loan as part of Inter Corporate Deposit ("ICD") to the Corporate Debtor. According to the Respondent Debtor, in case such Board Resolution was not passed by the Financial Creditor, the ICD could not be termed to be legal in nature since the requirement of Section 186 of Companies Act 2013 were stated to be mandatory in nature. Corporate Debtor alleged that the Financial Creditor had not annexed any copy of such Board Resolution with the Application/ Petition under reply nor have they shown that such Board Resolution, if passed, had also been intimated to the Registrar of Companies. As a consequence, the Corporate Debtor pleaded that the ICD copy annexed with the Petition could not be relied upon.

3.2. The Corporate Debtor also vehemently argued that "Article VII – Events of Default and Remedies, Clause 7.1" contained in the ICD enumerated what constituted as event of default. According to the Corporate Debtor, Clause 7.2 of the ICD – Consequences of events and Default stipulates that on occurrence of any of the event of default as per Clause 7.1, the Financial Creditor "shall" give prior to 30 days' notice of such default upon the Corporate Debtor and then "shall" have the right to terminate the ICD. Further argued that as per the terms of the ICD, the Financial Creditor is under obligation to set in motion any of the rights available to it under the ICD, only after termination of the ICD. The Respondent Debtor claimed that no such letter of termination of the ICD had till date been issued by the Financial Creditor to the Corporate Debtor. Hence, argued that the Petition itself was pre-mature and unfounded.

3.3. The Corporate Debtor denied that the interest as calculated by the Financial Creditor is payable by the Corporate Debtor since the ICD itself was illegal in nature.

3.4. The Corporate Debtor pointed out that in the computation of interest at Exhibit-C, the Financial Creditor has shown '90 months' instead of '90 days'.

3.5. The Corporate Debtor further submitted that the Financial Creditor is holding on to collateral/ security which is available to the Financial Creditor to liquidate. However, no notice of such action being initiated for liquidation of collateral is intimated by the Financial Creditor until date. Further the Financial Creditor has not terminated the Agreement for Pledge of Shares thereby clearly signifying their intent to try recovering their dues by initiating the present proceedings and on failure to do so, would like to convert their loan into equity by enforcing the Agreement for Pledge of Shares. Corporate Debtor alleged that this is clearly a case where the Petitioner is indulging in forum fishing. Respondent Debtor also argued that no notice to enforce the Demand Promissory Note handed over by the Corporate Debtor to the Financial Creditor has been issued by the Financial Creditor. Hence the Corporate Debtor pleaded that the Petition is premature.

3.6. The Corporate Debtor also submitted that an amount of ₹11,81.,250/- was already paid to the Financial Creditor by the Corporate Debtor which the Corporate Debtor had either failed to account for or had erroneously accounted the same towards interest whereas the said amount was first to be applied towards amortization of the principal amount of loan especially when the ICD terms are silent on the nature of treatment or precedence to be given for repayments.

<u>Rejoinder by the Petitioner/ Financial Creditor</u> :-

4. The Financial Creditor in its Rejoinder dated 15.04.2019 submitted that the Rejoinder was filed as per Order dated 14.03.2019 of this Tribunal. At the outset the Financial Creditor denied the contents of the Reply of the Respondent Debtor to the extent they were inconsistent. The Financial Creditor vehemently argued that there is no denial and/ or dispute that an amount of ₹3,50,00,000/- ("Loan Amount") was disbursed to the Respondent/ Corporate Debtor on 27.10.2017 vide the Loan Agreement. There is also no denial and/ or dispute to the fact that the Respondent/ Corporate Debtor had utilized the money. Also stated that besides making a payment of ₹11,81,250/- towards interest, the Respondent/ Corporate Debtor had failed to repay the Loan Amount along with applicable and accruing interest.

4.1. The Financial Creditor also submitted that there was no denial that the moneys were disbursed by the Financial Creditor to the Respondent/ Corporate Debtor under the Loan Agreement against the consideration for time value of money.

4.2. A copy of the ledger account of the Respondent/ Corporate Debtor maintained in the books of the Financial Creditor is placed on record to explain the nature of the transaction of ₹11,81,250/- as "Interest" received on 23.02.2018, as applicable under the Loan Agreement.

4.3. The Financial Creditor has submitted that Ms. Danish Chiniwala, an employee designated as Deputy General Manager, Group Legal, is the authorized representative of the Financial Creditor. Further stated that she has been duly authorized by the Financial Creditor to file the present Application. Further, in addition to the board resolution dated 22.02.2018 passed by the Financial Creditor authorizing Ms. Danish Chiniwala to represent the Financial Creditor and file any pleadings/application/petition before any Forum, Tribunal or Court, the board resolution dated 28.09.2017 passed by the board of directors of the Financial Creditor pursuant to Section 186 of the Companies Act, 2013 approving grant of loan to the Respondent/ Corporate Debtor, give specific authority to Ms. Danish Chiniwala to act as the authorized representative in relation to the said Loan Agreement.

4.4. The Petitioner/ Financial Creditor further argued that the requirement of having a specific authority to initiate Corporate Insolvency Resolution Process is applicable only in the case of a Power of Attorney Holder and not in the case of 'authorized representative' who has been duly authorized vide a board resolution passed by the Board of Directors of Company The terms 'authorized representative' and 'power of attorney holder' are distinct and distinguishable from each other. In this regards the Petitioner has relied upon Hon'ble National Company Appellate Law Tribunal ("NCLAT") Order dated 20.09.2017 [*Company Appeal (AT)(Insol.) No.30 of 2017 in the case of Palogix Infrastructure Private Limited vs. ICICI Bank Limited]* in which it has held that the authorized representative who has the authority to grant loan and act as authorized representative in relation to the loan, is also authorised to file an application under Section 7 of the IB Code, 2016 on behalf of the Financial Creditor.

<u>FINDINGS</u>

5. Heard the submissions of both the sides. Perused the contents of the Petition as well as the reply of the Respondent in the light of the annexed evidences. On examination of sequence of events, ex facie it is evident that through bank transactions money was transferred from Federal Bank on 27.10.2017 as per the bank statement on record. It is also not in dispute, rather admitted factual position that an

"Inter Corporate Deposit" (ICD) Agreement dated 26.10.2017 was executed by the Debtor Company on one part and the Petitioner on the other part, through which in unequivocal terms it was agreed that the repayment of impugned Debt amount (*supra*) shall be made in 90 days. It was also agreed that "the Borrower shall pay to the ICD provider interest for the Interest Period at the rate of 15% per annum (the "Interest Rate") payable at the end of said 90 days from the date of this Agreement". It is also an admitted fact that if the Borrower committed any default in the repayment/ payment of ICD, interest and/ or any other monies as may have become due to the ICD Provider in terms of this Agreement on their respective due dates, the Borrower shall pay to the ICD Provider default interest at the rate of 2% (Two percent) per annum in addition to the Interest Rate.

5.1. It is pleaded by the Petitioner/ Financial Creditor that the Corporate Debtor had defaulted to make repayments of the impugned Financial Debt in accordance with the terms of the Inter Corporate Deposit (ICD) Agreement dated 26.10.2017.

6. In the light of the above discussion and on due perusal of the documents annexed, the Debt is to be qualified as "Financial Debt" as defined under section 5(8) of Insolvency & Bankruptcy Code, 2016. As a result, the Financial Creditor has filed this Application for initiating Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor.

6.1. The submission of the Respondent Debtor that the Financial Creditor had filed the impugned Petition without any due 'authority' and hence illegal and argued that Ms. Chiniwalla is not authorized to affirm the said Petition under any pretext. It is, however, worth to mention here that the Hon'ble NCLAT in Order dated 20.09.2017 [*Company Appeal (AT)(Insol.) No.30 of 2017 in the case of Palogix Infrastructure Private Limited vs. ICICI Bank Limited]* it was held that the authorized representative who has the authority to grant loan and act as authorized representative in relation to the loan, is also authorised to file an application under Section 7 of the IB Code, 2016 on behalf of the Financial Creditor.

6.2. The name of Ms. Danish Chiniwala has been prominently referred in the Resolution passed in the meeting of Finance Committee of the Board of Directors of the Financial Creditor held on 22.02.2018 as also at Sl. No.5, Part-I of Form No.1 of the impugned Petition. Accordingly, the lack of authority of Ms. Danish Chiniwala, as alleged by the Corporate Debtor, does not hold any water.

7. Since this is a Petition of "Financial Creditor", therefore, the Insolvency Process shall commence as prescribed under Section 7 of I&BC, 2016.

8. The Petitioner / Financial Creditor has proposed the name of the IRP **Mr. Atul Jain,** Address: GMJ & Co., Chartered Accountants, Vastu Darshan, 3rd Floor, Above Central Bank of India, Azad Road, Andheri (East), Mumbai – 400 069, Registration No. IBBI/IPA-001/IP-P00307/2017-18/10571, Email: atuljain@gmj.co.in. The proposed IRP has furnished the requisite Certificate on Form No.2 that no Disciplinary Proceeding is pending. On due consideration, the proposal of appointment of the IRP is hereby confirmed.

9. Upon Admission of the Application and Declaration of "**Moratorium**" the Insolvency Process such as Public Announcement etc. shall be made immediately as prescribed under section 13 read with section 15 of The Code. The appointed IRP shall perform the duties as an Interim Resolution professional as defined under section 18 of The Code and inform the progress of the Resolution Process and the compliance of the directions of this Order within 30 days to this Bench. A liberty is granted to intimate even at an early date, if need be.

10. It is hereby pronounced that the "Moratorium" as prescribed under Section 14 of the Code 2016 shall come into operation. As a result, institution of any suit or parallel Proceedings before any Court of Law are prohibited. The assets of the Debtor must not be liquidated until the Insolvency Process is completed. However, the supply of essential goods or services to the Corporate Debtor shall not be suspended or interrupted during "Moratorium Period". This direction shall have effect from the date of this Order till the completion of Insolvency Resolution process.

11. Accordingly, this **C.P.(IB)-2826/(MB)/2018** stood "Admitted".

12. The Corporate Insolvency Resolution Process is commenced from the date of this Order.

Sd/-
M.K. SHRAWAT
Member (Judicial)

Date : 22.07.2019
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