

IN THE NATIONAL COMPANY LAW TRIBUNAL

KOLKATA BENCH

KOLKATA

C.P. (IB) No. 79/KB/2019

IN THE MATTER OF:

An application 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.

AND

IN THE MATTER OF:

M/S. BLUPEX VYAPAR PRIVATE LIMITED, Identification No. U22211WB1994PTC063572, having its registered office at 1, Rajendra Nath Mukherjee Road, Room No. 25, 5th Floor, kolkata 700001.

... Financial Creditor

-Versus-

IN THE MATTER OF:

M/S. HOWRAH MILLS COMPANY LIMITED, Identification No. L51909WB1890PLC000625, having its registered office at Howrah House, 135, Foreshore Road, Howrah – 711 102.

... Corporate Debtor

Coram: Shri Jinan K.R., Hon'ble Member (Judicial) &

Shri Harish Chander Suri, Hon'ble Member (Technical)

Counsel on Record:

1. MS. URMILA CHAKRABORTY, Adv.]
2. MR. A. AGARWALLA, Adv.] For Financial Creditor
3. MR. B. SHARMA, Advocate]

1. MR. JOY SAHA, Sr. Advocate]
2. MR. D.N. SHARMA, Advocate] For Corporate Debtor
3. MR. P. KAR, Advocate]

Date of pronouncement of Order: 06/12/2019.

ORDER

Per Shri Harish Chander Suri, Hon'ble Member (Technical).

1. By way of this application under Section 7 of the Insolvency & Bankruptcy Code read with Rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016, **M/s. Blupex Vyapar Pvt. Ltd.**, the Financial Creditor through its Authorised Representative Mr. Bipin Kumar Agarwala, its Director, hereinafter referred to as the "Financial Creditor" seeks initiation of Corporate Insolvency Resolution Process against **M/s. Howrah Mills Company Limited**, hereinafter referred to as the "Corporate Debtor". The Financial Creditor has also proposed the name of Mr. Manish Jain, to act as the Interim Resolution Professional in case the application is admitted. Form No. 2 duly signed and consented by the proposed IRP Mr. Manish Jain is also seen filed on record.

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2. It is submitted by the Financial Creditor that the Financial Creditor had provided a temporary accommodation loan to the Corporate Debtor of Rs. 25.00 lacs @ 16% per annum interest for 120 days on 6th June, 2014 which was disbursed vide UTR No. VIJBH14157064822 which was acknowledged and accepted by the Corporate Debtor vide its letter dated 6th June, 2014. A sum of Rs.1,31,507/- (Rupees One Lakh Thirty One Thousand Five Hundred and Seven Only) was paid as interest by the Corporate Debtor for 120 days and requested extension of time to repay the loan. The Financial Creditor vide its letter dated 25th October, 2014 acceded the request. Thereafter the Corporate Debtor repeatedly sought for extension of time to repay the loan vide letters dated 12th February, 2015, 12th June, 2015 and 18th December, 2015. Thereafter the Corporate Debtor gave a cheque bearing No. 182061 dated 15th February, 2016 for a sum of Rs.25.00 lacs and another cheque bearing No. 352382 dated 10th May, 2016 amounting to Rs.2,44,642/-. Both these cheques, however, were dis-honoured on the ground of "account closed" and "insufficient fund" respectively.

3. It is submitted that in spite of several demands, the Corporate Debtor neglected to repay. The Financial Creditor thus issued a notice dated 15th June, 2016 claiming the amount of Rs.28,94,382/- which was duly received by the Corporate Debtor. It is submitted by the Financial Creditor that the amount claimed by the Financial Creditor is Rs.36,86,640/- and the date of default is 10th May, 2016.

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The Financial Creditor has also enclosed a copy of the Tabular Statement issued by Vijaya Bank since 1st April, 2014 till 27th November, 2018 reflecting the entire transactions with the Corporate Debtor.

4. In its reply affidavit, the Corporate Debtor has submitted that the application is not maintainable and is liable to be dismissed. And that the Form No. 1 is not as per the Insolvency & Bankruptcy Code, 2016. It is submitted that the Financial Creditor has suppressed that the Corporate Debtor had filed a winding up petition under Sections 433, 434 and 439 of the Companies Act, 1956 in the High Court at Calcutta being **C.P. No. 707 of 2016** and that the subject matter under Section 7 of the Code was also the same subject matter as was in the winding up petition. It is stated that the purported loan was given to the Corporate Debtor on 6th June, 2014.

5. It is submitted that the Financial Creditor has withdrawn the winding up petition vide order dated 6th December, 2018 whereby the C.P. No. 707 of 2016 was 'dismissed as not pressed'. And that after having withdrawn and not pressed CP No. 707 of 2016, the Financial Creditor cannot approach this Tribunal now under Section 7 of the Code as the claim and cause of action of the Financial Creditor no longer survives. It is stated that no leave was obtained by the Advocate representing the Financial Creditor before the Hon'ble Calcutta High Court on 6th December, 2018. It is stated that



since no leave has been obtained under order 23 Rule 3 of the Code of Civil Procedure, 1908 by the Financial Creditor for enabling the Financial Creditor to apply fresh before the Adjudicating Authority on the same cause of action, this petition cannot survive.

6. The Corporate Debtor has further submitted that the alleged claim of the Financial Creditor is also barred by time and cannot form the subject matter of Section 7 application. It is submitted that the alleged loan was given to the Corporate Debtor on 6th June, 2014 and the application under Section 7 has been instituted on 21st December, 2018, and thus it has become barred by limitation.

7. In the rejoinder the Financial Creditor has denied the averments and allegations made in the reply affidavit and the averments made in the application under Section 7 of the Financial Creditor has been stated to be correct and reformed. It is stated that Mr. Bipin Kumar Agarwala has been duly authorized by the Financial Creditor vide Resolution of its Board of Directors dated 4th December, 2018, authorizing him to represent, make and affirm all pleadings to be filed in respect of the present proceedings. It is denied that any material facts have been suppressed. It is further submitted that no leave was required to be taken for institution of the present proceedings because the present proceedings in IBC 2016 is an independent proceeding. It is denied that the Financial Creditor should not have approached this Tribunal under Section 7 of

the IBC or the present proceedings should not have been filed or that the right to issue does not survive upon the Financial Creditor without the leave of the High Court. The Financial Creditor has reiterated the averments mentioned in its application.

8. During the course of argument it is submitted that the Financial Creditor in its Supplementary Affidavit submitted that the date of default is 10th May, 2016. It is submitted that the cheque issued by the Corporate Debtor in respect of the principal amount and interest amount were dis-honoured. It is submitted that the short term loan was renewed from time to time. It is stated that the notice dated 15th June, 2016 under Sections 433/434/439 of the Companies Act, 1956 was issued to the Corporate Debtor but no reply to the notice was issued. The Financial Creditor has also filed the computation sheet stating balance outstanding as on 30th November, 2019 being Rs.36,86,640/-.

9. The Ld. Sr. Counsel for the Corporate Debtor has submitted his arguments on two points viz., the maintainability without the leave of the High Court once a winding up petition was dismissed and secondly on the point of limitation. It is stated that in the body of the application there is no mention of the High Court proceedings or that any proceedings had been filed in the High Court of Calcutta and that the fact has been concealed by the Financial Creditor.

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10. It is submitted that under order 23 Rule 3 and Order 23 Rule 4 of the CPC, the filing of the petition and withdrawal thereof would amount to res judicata and therefore the present application will not survive being hit by res judicata because liberty had not been granted by the High Court while dismissing the petition under Sections 433, 434 & 439 of the Companies Act. The Ld. Counsel referred to the procedure under Sections 434(a) & 434(c) which provides procedure for transfer of matters from the High Court to this Adjudicating Authority. According to the Ld. Counsel the procedural requirement has not been followed by the Financial Creditor. The Financial Creditor has not filed any application for transferring its petition from the High Court to this Tribunal, rather the petition has been dismissed as not pressed and separate application has been filed which cannot be permitted to be filed before this Tribunal.

11. It is stated that the Ld. Counsel for the Applicant/Petitioner has invited order for dismissal and the statutory provisions have not been complied with. The Ld. Counsel has referred to the judgment passed by Hon'ble Supreme Court of India reported in (1987) 1 SCC 5 Sarguja Transport Service vs. State Transport Appellate Tribunal M.P., Gwalior and Others and (2012) 1 SCC 378 Vinod Kapoor vs. State of Goa and Others.



12. As regards limitation Mr. Saha, has submitted that limitation can be saved under Sections 14, 18 & 19 of the Limitation Act, otherwise it cannot be saved under Section 14, for instituting proceedings before wrong forum. It is stated by the Corporate Debtor that this petition cannot be entertained because the date of default has not been mentioned in the application. It is stated that the original date of contract was 06.06.2014 which was for 120 days. The date of default thus occurred on 4th October, 2014 and the limitation period for filing this application would expire on 4th of October, 2017. It is submitted that the present application which has been filed on 21st December, 2018 is clearly barred by limitation. It is further submitted that issuance of post dated cheques, if dishonoured will not save the limitation.
13. In reply to the arguments of the Corporate Debtor, the Financial Creditor has submitted that the default will arise only on the dishonouring of the cheques and since the cheques relating to the principal and the interest had been issued on 18th December, 2015 by the Corporate Debtor, the post dated cheque No. 182061 for the principal amount of Rs. 25.00 lacs dated 15th February, 2016 was dishonoured for the reason "account closed" on 10th May, 2016, the date of default would be on 10th May, 2016 and so far as the cheque No. 352282 dated 10th of May, 2016 for Rs.2,44,642/- was dishonoured on 17th May, 2016 for the reason "funds in sufficient", the date of default would be 17th May, 2016.



14. It is submitted by the Financial Creditor that even though the cheques were forwarded to the Financial Creditor along with a letter dated 18th December, 2015 issued by the Corporate Debtor, the period of limitation would start running from the date of dishonouring of the cheque and not from the date of letter accompanying the cheques. The date of default being 10th May, 2016 and 17th May, 2016, the date of default would be 10th May, 2019 and 17th May, 2019.
15. It is submitted that since the present application has been filed on 21st December, 2018, the application is very much within the period of limitation. So far as the question of leave in the matter of winding up petition filed before the Hon'ble High Court of Calcutta when the petition was dismissed as not pressed, we are of the view that the present application has a separate cause of action and is not depending on or in continuity with the winding up petition under Sections 433, 434 and 439 of the Companies Act which was dismissed as not pressed because the Financial Creditor might have been advised to do so for filing the present application before this Tribunal. In our view, no res judicata will operate against the Financial Creditor because both the proceedings have separate cause of action and could be filed independently.

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16. The Financial Creditor has been able to prove its case that a sum of Rs. 25.00 lacs along with interest was due and outstanding from the Corporate Debtor for which two separate cheques had been issued which were dis-honoured, thereby giving a cause of action to the Financial Creditor for proceeding against the Corporate Debtor under Section 7 of the IBC. The Corporate Debtor does not appear to have any valid ground in its defense. The ground of res judicata and limitation has been considered and rejected by this Tribunal.
17. We, therefore, are of the considered view to admit the application of the Financial Creditor for initiating the Corporate Insolvency Resolution Process against the Corporate Debtor and therefore pass the following:-

ORDERS

- i) The application filed by the Financial Creditor under Section 7 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor, **M/S. Howrah Mills Company Limited** is hereby **admitted**.
- ii) Moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The IRP shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Section 15.



- iii) Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:-
- a) The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;
 - (b) Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
 - (c) Any action to foreclose, recover or 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 (54 of 2002);
 - (d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.
- iv) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during moratorium period.





- v) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- vi) The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.
- vii) Provided that where at any time during the Corporate Insolvency Resolution Process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of the corporate debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.
- viii) **Mr. Manish Jain** of 2B, Grant Lane,, 3rd Floor, Room No. 303, Near Lal Bazar Bata shop, Bajrang Kunj, Kolkata 700012, having Registration No. **IBBI/IPA-001/IP-P00582/2017-2018/11023**, Email ID: manishmahavir@gmail.com, Mobile No. 9830248684, an Insolvency professional is hereby appointed as Interim Resolution Professional by this Tribunal for ascertaining the particulars of creditors and convening a meeting of Committee of Creditors for evolving a resolution plan.

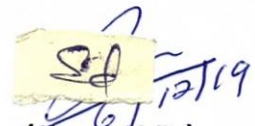
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- ix) The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors and shall identify the prospective Resolution Applicant within 105 days from the insolvency commencement date.
- x) The Registry is hereby directed under section 7(7) of the Insolvency and Bankruptcy Code, 2016 to communicate the order to the Financial Creditor, the Corporate Debtor and to the I.R.P. by Speed Post as well as through E-mail.
- xi) The matter be listed on **07.01.2020** for filing of the progress report.
- xii) Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.



(Harish Chander Suri)
Member (T)



(Jina K.R.)
Member (J)

Signed on this, the 6th day of December, 2019.

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