

**IN THE NATIONAL COMPANY LAW TRIBUNAL**

**MUMBAI BENCH-II**

**CP (IB) 4271/MB/C-II/2018**

Under section 7 of the Insolvency &  
Bankruptcy Code, 2016

*In the matter of*

**Essel Infra projects Limited**

**[CIN: U74999MH1987PLC044006]**

513/A, 5<sup>th</sup> Floor, Kohinoor City, Kirool  
Marg, Kurla (West), Mumbai-400070.

...Financial Creditor

Versus

**Kakade Developers Private Limited**

**[CIN: U70102PN2005PTC020491]**

Sanjay Kakade Group Plot No. 1205,  
Shirole Road near P. Jog Classes, Shivaji  
Nagar, Pune-411095.

...Corporate Debtor

**Order Delivered on 19.03.2020**

***Coram:***

Hon'ble Member (Judicial) : Smt. Suchitra Kanuparthi

Hon'ble Member (Technical) : Shri. Chandra Bhan Singh

***Appearances:***

For the Financial Creditor : Mr Shyam Kapadia a/w Mr. Vishal  
Jathar i/b MDP & Partners, Advocates

For the Corporate Debtor : Mr AkshayPetkar a/w Mr Aniket  
Malu, Advocates.

**ORDER**

**Per: Suchitra Kanuparthi, Member (Judicial)**

1. Essel Infraprojects Limited (hereinafter called 'Petitioner') has sought the Corporate Insolvency Resolution Process against Kakade Developers Private Limited (hereinafter called the 'Corporate Debtor') on the ground that the Corporate Debtor committed default to the extent of Rs.31,94,91,953/- including interest, as provided under Section 7 of Insolvency and Bankruptcy Code, 2016 (hereafter called the 'Code') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

**Facts of the case:**

2. The Petition reveals that the Corporate Debtor approached the Petitioner with a request to grant immediate financial assistance of Rs.25,00,00,000/- in form of Inter Corporate Deposit. The Petitioner granted the said facility in favour of the Corporate Debtor vide ICD agreement dated 15.02.2015 between the Petitioner and Corporate Debtor and Mr. Sanjay Kakade (Director and promotor of the Corporate Debtor) as a personal guarantor as well as Confirming party. The copy of the ICD agreement is annexed to the petition.
3. The particulars of computation of amount claimed as mentioned below:

Date	Facility	Principal	Interest @13% P.a.	Principal amount in Rs.
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17 <sup>th</sup> December, 2017	Inter Corporate Deposit	Direct transfer by way of RTGS		25,00,00,000/-
September 2016 to 31 <sup>st</sup> October, 2018				6,94,91,953/-
<b>Total</b>				<b>31,94,91,953/-</b>

4. The said loan amount disbursed by the Petitioner by way of the RTGS to the Corporate Debtor on 17.12.2015. The terms and conditions of the Intercorporate agreement stipulates the repayment terms as extracted below:

- e) *The Borrower shall repay the said ICD of Rs.25,00,00,000/- (Twenty-Five Crores Only) together with interest thereon in terms of Clause (d) as under: -*
- i) *Rs.10,00,00,000/- (Ten Crores Only) together with interest thereon in terms of Clause (d) on 14<sup>th</sup> June 2016 or any other date as may be mutually agreed, from the date of receipt of the aforesaid ICD. Undated Saraswat Bank Cheque bearing no. 275004 for Rs.10,64,10,959/- (Ten crore sixty-four lacs ten thousand and nine hundred fifty-nine only) has been given by the Borrower to the Lender towards its repayment obligations.*
- ii) *Rs.15,00,00,000/- (Fifteen Crores Only) together with interest thereon in terms of Clause (d) on 12<sup>th</sup> September 2016 or any*

*other date as may be mutually agreed from the date of receipt of the aforesaid ICD. Undated Saraswat Bank cheque bearing no 274993 for Rs.16,44,24,658/- (Sixteen crores forty-four lacs twenty-four thousand six hundred and fifty-eight only) has been given by the Borrower to the Lender towards its repayment obligations.*

- f) At the request of the Borrower, Mr. Sanjay Kakade has, in consideration of the said ICD from the Lender to the Borrower, agreed to Guarantee the said ICD and hereby agrees and undertakes to make, without delay, demur or protest and on first demand, and without first recourse to the Borrower within 24 hours of demand by the Lender, the payment of the principal amount not exceeding Rs.25,00,00,000/- (Twenty-Five Crores Only), along with interest and other monies payable by the Borrower as per this Agreement which may become due and payable at any point in time.*
- g) The entire Principal amount of ICD or balance thereof, outstanding at any point of time, shall become forthwith due and payable by the Borrower to the Lender upon the happening of all or any of the following events, namely;*
- Any representation and /or statement of the Borrower's proposal being found incorrect or the Borrower committing any breach or default in the performance and /or observance of any terms and conditions or provision contained in these presents or any other terms and conditions relating to the ICD.*

- *The Borrower entering into any arrangement or composition with its other creditors or committing any act, the consequence of which may lead to the winding up of the Borrower;*
  - *Execution or distress or other process being enforced or levied upon against the whole or any part of the Borrower's assets/properties.*
  - *Any order being made or a resolution being passed for winding up of the Borrower (except for the purposes of amalgamation/reconstruction with the approval of the Lender)*
  - *A receiver being appointed in respect of the whole or any part of the assets/ properties of the Borrower.*
  - h) *No delay in exercising or omission to exercise any right, power, remedy accruing to the Lender under this Agreement and no extension, accommodation, consent compromise, release or indulgence granted or shown by the Lender, to the Borrower shall be construed as a waiver or any of the Lender's right powers, remedies hereunder.*
5. The Corporate Debtor issued to two undated cheques in favour of the of Petitioner for the repayment of the abovementioned instalments including the amount of the interest. The details of the cheques as follows:
- a) Undated Cheque bearing No. 275004 for an amount of Rs.10,64,10,959/- drawn on Saraswat Bank.
  - b) Undated Cheque bearing No. 274993 for an amount of Rs.16,44,24,658/- drawn on Saraswat Bank.

6. The Corporate Debtor failed to repay the first instalment. The petitioner on 17.08.2016 wrote a letter to the Corporate Debtor and Mr. Sanjay Kakade for the payment of Rs.10,64,10,959/- within ten days failing which the said first cheque will be deposited for encashment. Additionally, remind the Corporate Debtor about the second instalment which is due on 12.09.2016. The copy of the said letter is annexed to the petition.
7. The petitioner further submits that during the shifting of certain functions, facilities and departments of the petitioner from Mumbai to Noida, first undated cheque No. 275004 for an amount of Rs.10,64,10,959/- got misplaced and therefore, the Petitioner could not deposit the first cheque for the encashment.
8. The Corporate Debtor in response to the said letter dated 17.08.2016 requested to the Petitioner not to deposit the second cheque for encashment and request for some time to repay the loan as the Corporate Debtor facing the financial crunch.
9. Despite repeated request and reminder of the petitioner the Corporate Debtor failed to repay the loan. Therefore, the petitioner deposited the second cheque for the encashment on 03.02.2017. The said cheque was dishonoured and returned with a memo "*Funds Insufficient*".
10. Thereafter at the request of Corporate Debtor, the second cheque was again presented by the Petitioner for the encashment on 06.03.2017 and on 18.04.2017, but the same was dishonoured with

the memo "*Funds Insufficient*" and "*Refer to drawer*" respectively. The copies of the return memo are annexed to the petition.

11. In the said circumstances, the Petitioner on 04.05.2017 sent a notice through advocate to the Corporate Debtor and Mr Sanjay Kakade being the guarantor to make payment of said second cheque amount, failing which appropriate proceedings under Sec.138 of Negotiable Instrument Act, 1881, **(NI Act)** would be initiated. The Corporate Debtor on 16.05.2017 reply to the said notice and raised false contentions and made allegations against the Petitioner.
12. The petitioner filed Criminal Complaint CC No.1189 of 2018 under Sec.138 of NI Act and the same is pending adjudication before learned Metropolitan Magistrate 58<sup>th</sup> Court at Bandra.
13. On 19.10.2018 the Petitioner sent a demand notice to the Corporate Debtor and invoking personal guarantee given by Mr Sanjay Kakade for the payment of the dues of Rs.31,83,34,419/-. On 23.10.2018 the Corporate Debtor replied to the Demand notice and raised certain contentions and allegations against the Petitioner, but did not deny the liability under the demand notice.
14. The petitioner claimed that on 31.10.2018 an amount of Rs.31,94,91,953/- is due and payable by Corporate Debtor to Petitioner along with interest @13% p.a. from 01.11.2018 till payment and realisation as agreed under ICD Agreement dated 15.12.2015. The date of default for first instalment being 14.06.2016 and second being 12.09.2016.

15. **REPLY BY CORPORATE DEBTOR:**

- a) The Corporate Debtor in their reply denied all the allegations put forth in the Petition and submitted that the petition is defective as the financial Creditor failed to furnish record of default with Information Utility.
- b) The due date as mentioned in ICD Agreement was optional and not fixed. Both clauses (ci) and (cii) categorically record that repayment of first tranche of Rs.10,00,00,000/- (ten crores only) was either on 14.06.2016 or any other date as may be specifically agreed. Similarly, second tranche by 12.09.2016 or any other date as may be mutually agreed.
- c) Two undated cheques of Saraswat Bank (i) Rs.10,64,10,959/- (Rupees ten crores sixty-four lacs ten thousand nine hundred and fifty nine only) bearing No. 275004 and (ii) Rs.16,44,24,658/- (Rupees sixteen crores forty four lacs twenty four thousand six hundred and fifty eight only) were handed over to the Petitioner towards repayment obligations. From the perusal of the above-mentioned clause (c) of the Intercorporate Deposit Agreement, it is evident that the presentation of both these cheques were to be made either on the specified date or on the mutually agreed date between the Petitioner and the Corporate Debtor.
- d) The undated cheque of Rs 10,64,10,959/- (Rupees ten crores sixty-four lacs ten thousand nine hundred and fifty-nine only) bearing No 275004 was never presented by the Petitioner. In fact,

the Petitioner in its notice dated 19.10.2018, made a statement that they have lost the said cheque. Therefore, the said amount cannot be considered in the total claim.

- e) The Petitioner was well aware of the wording and the mutual agreement of the above referred clause (e). In fact, the letter dated 17.08.2016 of the Petitioner is much later than the dates stipulated in clause (ei) i.e. 14.06.2016 thereby rightly acting upon the option of agreeing to the date of repayment on a mutually decided date. I say that the Respondent vide an email dated 29.08.2016 clearly indicated that the repayment and the cheques are to be presented are either on the dates mentioned in the agreement or *“any other date as may be mutually agreed”*. In the said context, the Petitioner was requested to defer the lodgement of cheques for presentation and with a proposal of meeting to mutually agree upon the suitable dates. Hereto annexed and marked as **Exhibit “A”** is a copy of respondent’s email dated 29.08.2016.
- f) The Petitioner vide its email dated 20.09.2016, clearly acknowledged the fact that mutually new dates were assigned between the parties for repayment. In the said mail the Petitioner has also attached revised working of the amounts. Hereto annexed and marked as **Exhibit” B”** is a copy of Petitioner’s email dated 20.09.2016. On 15.02.2017, the Corporate Debtor vide its email brought on record that Petitioner had deposited cheques without mutual consent as agreed in the Intercorporate Deposit

Agreement. Hereto annexed and marked as **Exhibit "C"** is a copy of Respondent's email dated 15.02.2017.

- g) The Corporate Debtor claimed that the Petitioner has not made out a case u/s -7 since there is no default as per explanation to Section 7 (1) of IBC along with record of default u/s 7(3) (a). The Petitioner has filed Commercial Summary Suit No 153 of 2019 under Order 37 Rule 1 of the Code of Civil Procedure, 1908 in the Hon'ble Bombay High Court. From the records, it appears that the Petitioner till date has not filed summons for Judgment in the said Commercial Summary Suit No. 153 of 2019 till date. The Respondent has filed Notice of Motion in the said Commercial Summary Suit to enter the appearance and defend the same. The Corporate Debtor has also prepared a detailed written statement indicating the factual and the legal aspects of the transaction between parties. Hereto annexed and marked as **Exhibit "D"** is a copy of Plaint in Commercial Summary Suit No. 153 of 2019 without exhibits.

16. **REJOINDER BY PETITIONER**

- a) The Petitioner denied the contentions of the corporate debtor in the reply. Further claimed that corporate debtor has failed to set out any valid reason/ground to oppose the captioned company petition. The technical defences are not maintainable.

- b) Sec.138 NI Act proceedings are pending and there is admission of debt by corporate debtor.
- c) The corporate debtor ought to have repaid the debt in accordance with clause 'e' of the ICD Agreement.
- d) The claim of Rs 10,64,10,959/ vide cheque no. 275004 cannot be considered was objected to and that the corporate debtor is liable to repay the entire amount due under the ICD Agreement.
- e) The petitioner accepted to extend the date of repayment subject to condition of issuance of fresh cheques and that fresh cheques were not issued.

17. **FINDINGS**

- a) The Intercorporate Agreement evidences the contractual arrangement of disbursement of monies to Corporate debtor and RTGS settlement report dated 12/10/2017 shows that monies were actually credited to the account of Corporate Debtor. The money was to be repaid in two tranches in terms of clause d of the Agreement. The same was not repaid and the petitioner requested for the repayment of the same vide letter dated 17/08/2016 and legal notice dated 4/05/2017.
- b) The Intercorporate Deposit agreement envisages the repayment schedule and rights of petitioner to seek repayment as follows:
  - I. *In the above consideration, the Lender has advanced on this December 15, 2015 a sum of Rs. 25,00,00,000 (Twenty-Five Crores*

*Only) to the Borrower by way of ICD at an interest of 13% per annum thereon, the receipt of which is hereby expressly and specially admitted and acknowledged by the Borrower;*

II. *The Borrower shall repay the said ICD of Rs.25,00,00,000 (Twenty-Five Crores Only) together with interest thereon in terms of Clause (d) as under: -*

i) *Rs.10,00,00,000/- (Ten Crores Only) together with interest thereon in terms of Clause (d) on 14<sup>th</sup> June 2016 or any other date as may be mutually agreed, from the date of receipt of the aforesaid ICD. Undated Saraswat Bank Cheque bearing no. 275004 for Rs.10,64,10,959/- (Ten crore sixty-four lacs ten thousand and nine hundred fifty-nine only) has been given by the Borrower to the Lender towards its repayment obligations.*

ii) *Rs.15,00,00,000/- (Fifteen Crores Only) together with interest thereon in terms of Clause (d) on 12<sup>th</sup> September 2016 or any other date as may be mutually agreed from the date of receipt of the aforesaid ICD. Undated Saraswat Bank cheque bearing no 274993 for Rs.16,44,24,658/- (Sixteen crores forty-four lacs twenty-four thousand six hundred and fifty-eight only) has been given by the Borrower to the Lender towards its repayment obligations.*

III. *At the request of the Borrower, Mr. Sanjay Kakade has, in consideration of the said ICD from the Lender to the Borrower, agreed to Guarantee the said ICD and hereby agrees and undertakes to make, without delay, demur or protest and on first demand, and without first recourse to the Borrower within 24 hours of demand*

*by the Lender, the payment of the principal amount not exceeding Rs.25,00,00,000/- (Twenty-Five Crores Only), along with interest and other monies payable by the Borrower as per this Agreement which may become due and payable at any point in time.*

- IV. g) The entire Principal amount of ICD or balance thereof, outstanding at any point of time, shall become forthwith due and payable by the Borrower to the Lender upon the happening of all or any of the following events, namely;*
- V. Any representation and /or statement of the Borrower's proposal being found incorrect or the Borrower committing any breach or default in the performance and /or observance of any terms and conditions or provision contained in these presents or any other terms and conditions relating to the ICD.*
- VI. The Borrower entering into any arrangement or composition with its other creditors or committing any act, the consequence of which may lead to the winding up of the Borrower;*
- VII. Execution or distress or other process being enforced or levied upon against the whole or any part of the Borrower's assets/properties.*
- VIII. Any order being made or a resolution being passed for winding up of the Borrower (except for the purposes of amalgamation/reconstruction with the approval of the Lender)*
- IX. A receiver being appointed in respect of the whole or any part of the assets/ properties of the Borrower.*
- X. No delay in exercising or omission to exercise any right, power, remedy accruing to the Lender under this Agreement and no extension, accommodation, consent compromise, release or indulgence granted or shown by the Lender, to the Borrower shall*

*be construed as a waiver or any of the Lender's right powers, remedies hereunder.*

18. In view of the above clause of the Agreement, it is clear that there is a debt of Rs.25 crores and the Corporate Debtor has defaulted in the payment of the same on the due date as envisaged in the Agreement. In a way the Corporate Debtor has admitted the Corporate Debt as the cheque which he had drawn towards payment of debt has been dishonoured. The contention of the corporate debtor that monies are not due and payable under the pretext that if the money is not paid by them on the date as mentioned in the agreement, it will be payable at the mutually agreeable date cannot be accepted. The rights of enforcement of debt under the agreement cannot be taken away by any arrangement and in the instant case the Intercorporate Agreement (ICD), the provides that the Corporate Debtor liability of repayment of loan is not absolved notwithstanding anything contained in the agreement as per clauses of ICD Agreement. Clause 'h' is extracted as follows:

*"No delay in exercising or omission to exercise any right, power, remedy accruing to the Lender under this Agreement and no extension, accommodation, consent compromise, release or indulgence granted or shown by the Lender, to the Borrower shall be construed as a waiver or any of the Lender's right powers, remedies hereunder."*

The intention of parties has to be gathered from the entire agreement and therefore it was agreed that the loan will be repaid by 14/06/2016 and when the monies were not being repaid when

called for and the lender under the Agreement could enforce this agreement notwithstanding any other clause in terms of clause “h” of the Agreement.

19. The claim has to be considered in total as per to the ICD Agreement dated 15.12.2015 and the claim of interest has to be granted and there has been a clear default of non-payment of the amounts borrowed under the said agreement.
20. The filing of Sec.138 NI Act or the recover proceedings is not a bar to admit Sec.7 IBC petition, when there is a debt and default.
21. The judgements relied on by the corporate debtor in Innoventive Industries case as reported in (2018)1SCC 407 and a decision of coordinate bench of Ahmedabad cannot be considered.
22. Ongoing through the facts and submissions of the petitioner and upon considering the same, it is concluded that the Financial Creditor has established that the loan was duly sanctioned and duly disbursed to the Corporate Debtor but there has been default in payment of Debt on the part of the Corporate Debtor.
23. Considering the above facts, we come to conclusion that the nature of Debt is a “Financial Debt” as defined under section 5 (8) of the Code. It has also been established that there is a “Default” as defined under section 3 (12) of the Code on the part of the Debtor. The two essential

qualifications, i.e. existence of 'debt' and 'default', for admission of a petition under section 7 of the I&B Code, have been met in this case.

24. As a consequence, keeping the afore said facts in mind, it is found that the Petitioner has not received the outstanding Debt from the Respondent and that the formalities as prescribed under the Code have been completed by the Petitioner, we are of the conscientious view that this Petition deserves '**Admission**'.
25. Further that, we have also perused the Form - 2 i.e. written consent of the proposed Interim Resolution Professional submitted along with this application/petition by the Financial Creditor and there is nothing on record which proves that any disciplinary action is pending against the said proposed Interim Resolution Professional.
26. The Financial Creditor has proposed the name of Insolvency Professional. The IRP proposed by the Financial Creditor, Mr. Jitendra Palande, having registration No. IBBI/IPA-003/IP-N00028/2017-18/10188, is hereby appointed as Interim Resolution Professional to conduct the Insolvency Resolution Process.
27. Having admitted the Petition/Application, the provisions of **Moratorium** as prescribed under **Section 14 of the Code** shall be operative. Henceforth, with effect from the date of order, and shall be applicable by prohibiting institution of any Suit before a Court of Law, transferring/encumbering any of the assets of the Debtor etc. However, the supply of essential goods or services to the "Corporate

Debtor” shall not be terminated during Moratorium period. It shall be effective till completion of the Insolvency Resolution Process or until the approval of the Resolution Plan prescribed under Section 31 of the Code.

28. That as prescribed under **Section 13 of the Code** on declaration of Moratorium the next step of **Public Announcement** of the Initiation of Corporate Insolvency Resolution Process shall be carried out by the IRP immediately on appointment, as per the provisions of the Code.
29. That the Interim Resolution Professional shall perform the duties as assigned under **Section 18** and **Section 15** of the Code and inform the progress of the Resolution Plan 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.
30. The Petition is hereby **“Admitted”**. The commencement of the Corporate Insolvency Resolution Process shall be effective from the date of the Order.
31. Ordered Accordingly.

Sd/-

**CHANDRA BHAN SINGH**  
**Member (Technical)**

19.03.2020  
SAM

Sd/-

**SUCHITRA KANUPARTHI**  
**Member (Judicial)**