

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

C.P. NO.IB-422(PB)/2018

IN THE MATTER OF:

Anurag Gupta

....Petitioner

Vs.

M/s B.K. Educational Services Pvt. Ltd.

....Respondent

SECTION: Under Section 7 of the Insolvency and Bankruptcy Code, 2016

Order delivered on: 10.10.2019

Coram:

CHIEF JUSTICE (RTD.) M.M. KUMAR

Hon'ble President

SHRI S.K. MOHAPATRA

Hon'ble Member (Technical)

PRESENTS:

For Petitioner

: Mr. Ashish Dholakia, Mr. Rohan Chawla,
Adv. Along with Mr. Anurag Gupta,
Petitioner

For Respondent

: -----

ORDER

M.M.KUMAR, PRESIDENT

The Petitioner claiming to be financial creditor has filed the instant Petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating



Authority) Rules, 2016 (for brevity 'the Rules') with a prayer to trigger Corporate Insolvency Resolution Process in respect of respondent M/s B.K. Educational Services Pvt. Limited (for brevity the 'corporate debtor').

2. The Corporate Debtor – M/s B.K. Educational Services Pvt. Ltd. was incorporated on 01.04.2005 under the provisions of the Companies Act, 1956. The identification number of the Corporate Debtor given is CIN U80301DL2005PTC134622.
3. It is submitted by the Petitioner that it had disbursed a total amount of Rs. 20,46,500/- to the respondent company in its capacity as the Director of the said company in pursuance of the Resolution passed by the Company in the meeting of Board of Directors dated 01.09.2015. The said resolution reads as under:

“RESOLVED THAT, As the Company is in deep financial trouble, because of non-availability of funds for payments to GNIDA and for continuing construction, hence the Directors of the company be and are hereby authorized to take/introduce necessary unsecured loans from shareholders, directors as well as relatives/related parties.



RESOLVED FURTHER THAT, the said loan shall be used to clear the overdue amount of Greater Noida Industrial Dev. Authority and to continuing construction of school building. That the amounts introduced/taken will be returned along with interest @ 12%, which is lower than the rate of interest being charged by Greater Noida Industrial Dev. Authority.”

RESOLVED FURTHER THAT, any such amount of loans obtained by the company shall be returned back soon after obtaining loans from Financial Institutions or by 30th June 2016.

“RESOLVED FURTHER, Smt. Kumkum Varshney, Director of the company is authorised to give or sign any acknowledgement, confirmation, promise, letter of authority, or guarantee in relation to any payment/repayment and it will be binding on company.”

4. The precise case of the Petitioners is that the total amount in default due and payable by the corporate debtor is Rs. 20,46,500/- . The petitioner has also attached a computation of the amount disbursed along with the dates of default when the amount became due and payable.

5. The Financial Creditor has proposed the name of Mr. Debashis Nanda as the Insolvency Professional with the address C-304,



Paradise Apartments, 40, I.P. Extension, Delhi-110092. His registration number is IBBI/IPA-003/IP-N00040/2017-18/10316. He has filed his written communication as per the requirement of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 along with the certificate of registration **(Page 34-36)**.

6. In Part-IV of the Petition, the Financial Creditor has given the details of the total amount of the financial debt along with the dates of disbursement. In Column 2 of Part-IV of the petition the Financial Creditor has given the details of the amount claimed in default and the date of the default.

7. In Part V of the Petition the Financial Creditor has mentioned the particulars of the documents and records that substantiate that the amount claimed was disbursed which includes the statement of account maintained with the financial creditors, photocopies of the bank statements of both the financial creditor and the corporate debtor, photocopies of the payments made to GNIDA and the statement of account maintained with the corporate debtor.



8. A reply to the petition has been filed by one Mr. Mukesh Aggarwal, being the Director of the Respondent- Corporate Debtor, who has been given authority vide Board Resolution dated 06.08.2018 and also a Rejoinder to the Reply has been filed by the Petitioner-Financial Creditor.
9. In the Reply the Respondent-Corporate Debtor has raised a preliminary objection to the maintainability of the petition and has questioned the material facts based on which the petition is filed. On that basis it is sought to be argued that the amount claimed to be in default is not a 'financial debt' within the meaning of Section-5(8) of the Code.
10. The petitioners have out rightly denied the assertion of the corporate debtor and have placed reliance on the judgement of the Hon'ble Appellate Tribunal in the case of Shailesh Sangani vs. Joel Cardoso and Another 2019 SCC Online NCLAT 52 where it held as under:

6. A plain look at the definition of 'financial debt' brings it to fore that the debt along with interest, if any, should have been disbursed against the consideration for the time value of money. Use of expression 'if any' as suffix to 'interest' leaves no room for doubt that the component of interest is not a sine qua non for bringing the debt within the fold of 'financial debt'. The amount disbursed as debt against the consideration for time value



of money may or may not be interest bearing. What is material is that the disbursement of debt should be against consideration for the time value of money. Clauses (a) to (i) of Section 5(8) embody the nature of transactions which are included in the definition of 'financial debt'. It includes money borrowed against the payment of interest. Clause (f) of Section 5(8) specifically deals with amount raised under any other transaction having the commercial effect of a borrowing which also includes a forward sale or purchase agreement. *It is manifestly clear that money advanced by a Promoter, Director or a Shareholder of the Corporate Debtor as a stakeholder to improve financial health of the Company and boost its economic prospects, would have the commercial effect of borrowing on the part of Corporate Debtor notwithstanding the fact that no provision is made for interest thereon. Due to fluctuations in market and the risks to which it is exposed, a Company may at times feel the heat of resource crunch and the stakeholders like Promoter, Director or a Shareholder may, in order to protect their legitimate interests be called upon to respond to the crisis and in order to save the company they may infuse funds without claiming interest.* In such situation such funds may be treated as long term borrowings. Once it is so, it cannot be said that the debt has not been disbursed against the consideration for the time value of the money. The interests of such stakeholders cannot be said to be in conflict with the interests of the Company. Enhancement of assets, increase in production and the growth in profits, share value or equity ensures to the benefit of such stakeholders and that is the time value of the money constituting the consideration for disbursement of such amount raised as debt with obligation on the part of Company to discharge the same. Viewed thus, *it can be said without any amount of contradiction that in such cases the amount taken by the Company is in the nature of a 'financial debt'.*

A perusal of the aforesaid para from the judgement of the Appellate Tribunal shows that a promoter/shareholder/director of the company can also



be its creditor. It is therefore evident that the petitioner as a director has a status different than that of the creditor. In the present proceedings the petitioner has invoked his status as one of the creditor of the respondent company.

11. Therefore the amount claimed by the petitioner is a 'financial debt' within the meaning of the Code. The petitioner has also placed on record the bank statements that show that the transactions have been made by him in favour of Greater Noida Industrial Development Authority (GNIDA) on behalf of the Company as per the resolution passed by the Board of Directors in its meeting dated 01.09.2015. The copies of the balance sheets filed for the years ending 2015,2016 and 2017 depict borrowings from directors, Shareholders and related parties under the heading 'Short Term Borrowings' to the tune of more than Rs.9 Crore. Even otherwise there is overwhelming evidence placed on record to show that the amount as claimed 'due and payable' was disbursed by the petitioner to GNIDA on behalf of the respondent company.



12. As a sequel to the aforesaid discussion and the material placed on record it is confirmed that the petitioner-financial creditor had disbursed money to the respondent-corporate debtor. It is accordingly held that the respondent-corporate debtor has committed default in repayment of the outstanding financial debt which exceeds the statutory limit of rupees one lakh. Thus, the petition warrants admission as it is complete in all respects.

13. Learned Counsel for the petitioner has argued that all requirements of Section 7 of the Code for initiation of Corporate Insolvency Resolution Process stand fulfilled and accordingly the present petition is admitted.

14. Having heard the learned counsels for the Financial Creditor and Corporate Debtor and having perused the paper book with their able assistance we find that the provisions of Section 7 (2) and Section 7 (5) of IBC have been complied as discussed in detail in our Order dated 27.11.18 rendered in the of ECL Finance Limited vs. Digamber Buildcon Pvt Ltd (IB-1039(PB)/2018).



15. After a conjoint reading of the aforesaid provision along with Rule 4 (2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, we are satisfied that a default has occurred and the application under sub section 2 of Section 7 is complete. The name of the IRP has been proposed and there are no disciplinary proceedings pending against the proposed Interim Resolution Professional.

16. As a sequel to the above discussion, this petition is admitted and Mr. Debashis Nanda is appointed as the Interim Resolution Professional.

17. In pursuance of Section 13 (2) of the Code, we direct that Interim Insolvency Resolution Professional shall immediately (3 days) make public announcement with regard to admission of this application under Section 7 of the Code.

18. We also declare moratorium in terms of Section 14 of the Code. It is made clear that the provisions of moratorium are not to apply to transactions which might be notified by the Central Government and a surety in a contract of guarantee to a corporate debtor. Additionally, the supply of essential goods



or services to the Corporate Debtor as may be specified is not to be terminated or suspended or interrupted during the moratorium period. These would include supply of water, electricity and similar other supplies of goods or services as provided by Regulation 32 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

19. We direct the Financial Creditor to deposit a sum of Rs. 2 Lacs with the Interim Resolution Professional to meet out the expenses to perform the functions assigned to him in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within three days from the date of receipt of this order by the Financial Creditor. The amount however be subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the Financial Creditor.

20. Directions are also issued to the ex-management to provide all documents in their possession and furnish every information in their knowledge within a period of one week



from the admission of the petition to the IRP, otherwise coercive steps to follow.

21. There is a general complaint received against the financial creditors, banks, NBFCs and Asset Reconstruction Companies that the amount claimed by them is far more than what is owed by the corporate debtor to them. Many a times the rate of interest is alleged to be exorbitant and allegations are levelled that a penal interest compounded monthly has been charged. We have no mechanism of rectification of claims made. However, the RPs ordinarily have professionals & experts at their disposal and in case the ex-management raises any such issue then the RP must get it settled in order to avoid any injustice to the corporate debtor.

22. The office is directed to communicate a copy of the order to the Financial Creditor, the Corporate Debtor and the Interim Resolution Professional at the earliest but not later than seven days from today. Petitioner is also directed to provide a copy of the complete paper book to the IRP. A copy of this order be also sent to the ROC for updating the Master Data. ROC shall send compliance report to the Registrar, NCLT.



23. Before parting we may notice CA Nos. 1139(PB)/2019 and 662(PB)/2019 filed by the respondent company by alleging that the petitioner along with his family has abused the process of newly enacted Insolvency and Bankruptcy Code, 2016 by wearing a cloak of a 'financial creditor' after he and his family members were forced to resign as the directors/shareholders of the company on 27.06.2016. The allegation is that the present proceedings have been initiated with malafide and malicious intent and the application filed under Sections 65 and 75 of the Code warrants to be accepted by imposing maximum penalty on the petitioner.

24. The respondent has asserted that the corporate debtor was incorporated in 2005 and has given the details of the shares and shareholding pattern from 01.04.2005 till date. It is also averred that the mother of the petitioner was the sole shareholder holding 100% equity of the corporate debtor from 28.09.2012 to 30.06.2016 which is dubbed as illegal as minimum 2 shareholders are required to form a private company under the Companies Act. The petitioner transferred these 100% shares to his mother with malafide intention to



keep the control of the company in his hands. As a matter of fact shares were purchased by Mr. Mukesh Aggarwal and Mrs. Sunita Aggarwal from Ms. Pradeep Kaur and Mr. Gurinder Singh. The transfer deeds have been placed on record. It however remains undisputed that during 19.05.2005 to 27.06.2016 e-form were filed by the petitioner himself as every e-form contained his e-mail id or the company's e-mail id. There are many other allegations made in the application.

25. It is true that RD in its report dated 18.03.2019 has held that the petitioner is guilty of certain acts of indiscretion by recording the preliminary findings on the basis of inspection of Books of Accounts and other records. It has been concluded that there are certain violations in respect of Sections 220 and 159 of the Companies Act, 1956 and 253/152(3) of the Companies Act, 1956/2013 and further.

26. The issue before this Tribunal is whether the petitioner has advanced loan to the respondent company (in his capacity as a creditor) which has remained unpaid. If the loan advanced has not been paid then default has occurred. Therefore any violation of the provisions of the Companies Act, 1956/2013 would not make any difference and in his capacity as a Director



the consequences of various violations would be faced by the petitioner. The admission of the present petition is not to prejudice those proceedings and the same shall remain intact. Therefore we are unable to find any substance in the argument that petition has been filed with oblique motive particularly when the amount deposited by the petitioner has not been disputed as it is fully supported by the resolution passed by the company. The objection raised is therefore rejected.

- Sd -

(M.M.KUMAR)
PRESIDENT

Sd/-

(S.K. MOHAPATRA)
MEMBER (TECHNICAL)

Pronounced under Rule 151 of the NCLT Rules as Sh. S.K. Mohapatra, Member (T) is not holding the Court today.

- Sd -

(Nirmala Vincent)
Court Officer

10.10.2019
(VIDYA)