



**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-IV
COMPANY PETITION NO. (IB)-249(ND)/2021**

Under Section 7 of the Insolvency and Bankruptcy Code, 2016

In the matter of:

Anurag Rastogi

...Petitioner/Financial Creditor

Versus

Charms India Pvt Ltd.

...Respondent/Corporate Debtor

Order Delivered On: 29.03.2023

CORAM:

MR. P. MOHAN RAJ, HON'BLE MEMBER (JUDICIAL)

DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)

Present-

For the Applicant: None present

For the Respondent: Mr. Shekhar Gupta, Mr. Arav Kapoor, Mr. Shashank Uppadhya and Mr. Devanshu Kumar Advocates

ORDER

PER: DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)

1. The instant petition is filed by Mr. Anurag Rastogi (hereinafter referred as 'Applicant') residing at G-15, Lawyers Colony, Bye Pass Road Agra, Uttar Pradesh-282005 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 initiate Corporate Insolvency Resolution Process in respect of M/s Charms India Private Limited (Respondent Company), referred to as the Corporate Debtor.



2. The Respondent Company Charms India Private Limited (CIN No. U80301DL1996PTC077322) was incorporated on 19.03.1966 having its registered office situated at 91, Meena Apartments, Patparganj, New Delhi-110095. Since the registered office of the respondent Corporate Debtor is in New Delhi, this Tribunal having territorial jurisdiction over the NCT of Delhi, is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of Respondent/Corporate Debtor under sub-section (1) of Section 60 of the Code.
3. The present petition was filed on 10.07.2020 before this Adjudicating Authority on the ground that the Corporate Debtor has defaulted to make a payment of a sum of Rs. 3,18,36,814/- as on 10.07.2020.

Submissions of learned Counsel appearing for the Applicant/Petitioner

4. The case of the petitioner precisely is that the Corporate Debtor had availed loan advanced from the Applicant/Petitioner for a sum of Rs. 65,00,000/- by way of loan agreement dated 01.08.2014 repayable by 01.08.2015 and also acknowledged to repay with interest at the rate of 27% per annum on the loan amount on the promissory note dated 01.08.2014.
5. That the Corporate Debtor handed over a post-dated cheque bearing no. 636250 dated 01.08.2015 of sum Rs. 65,00,000/- drawn on Punjab & Sind Bank, towards the repayment of the loan as mentioned in terms of the Clause 5 of the Agreement.



6. It is submitted that the interest was payable on quarterly basis and the Corporate Debtor even handed over four post-dated cheques bearing no. 362509 dated 01.11.2014, No. 362510 dated 31.01.2015, No. 636251 dated 01.05.2015 and No. 636252 dated 01.08.2015, all in sum of Rs. 4,38,750/- and all drawn on Punjab & Sind Bank towards payment of interest on the loan amount. However, on request of the Corporate Debtor, the said cheques were not presented on due dates as the Corporate Debtor had represented that it shall pay the entire interest component at the end of the term of the loan agreement along with the principal amount as mentioned in terms of the Clause 3 of the Agreement.
7. That it is mentioned in Clause 9 of the Agreement that in case of default in repayment of loan amount along with interest on expiry of the term of the loan period, the corporate debtor will pay penal interest at the of 3.5% per month for the period after expiry of the loan term till the date of realization of the entire amount.
8. It is submitted that the Corporate Debtor had even provided security by way of mortgage of its property in the form of two flats measuring 975 square feet each and one flat measuring 850 sq. ft. in the project “Charms Castle” at Khasra No. 1056 & 1099, Noor Nagar, Main 6 Highway, N H-58, Raj Nagar Extension, Ghaziabad.
9. On 01.08.2015, the Corporate Debtor expressed his inability to repay. The Corporate Debtor requested the Financial Creditor to give 5-6 months in order to pay back the loan amount along with interest. He further agreed to pay penal interest after the expiry of loan period in



terms of the agreement. The Corporate Debtor requested the Financial Creditor not to present the post-dated cheques lying with it so the Financial Creditor did not present the post-dated cheques lying with it.

10. It is further submitted that the corporate debtor made part-repayment of sum of Rs. 35,00,000/- on 20.05.2016 against the due amount of Rs. 1,28,50,773/- with the assurance that it will pay the balance sum of Rs. 93,50,773/- shortly. On 12.07.2017 the Corporate Debtor again made part payment of Rs. 10,00,000/- against the due amount of Rs. 1,58,50,398/- and assured that it will pay the balance sum of Rs. 1,48,50,398/- towards outstanding financial debt and assured that it shall remit the balance payment shortly.

11. Therefore, as per part IV of the application it is claimed that as on 10.07.2020 a sum of Rs. 3,18,36,814/- is due and payable by the Respondent/Corporate Debtor.

12. The Financial Creditor has placed the following documents on record:

- a. Copy of statement of bank account of Financial Creditor;
- b. Copy of Loan Agreement and Promissory Note dated 01.08.2014 signed by Shri Sanjay Singhal, the Director of the Corporate Debtor; and
- c. Copy of statement of Corporate Debtor as maintained by Financial Creditor

13. The Financial Creditor has proposed the name of Mr. Sanyam Goel, IP having registration number IBBI/IPA-002/IP-N00138/2017-



18/10397, as the Interim Resolution Professional of the Corporate Debtor. The proposed Interim Resolution Professional has given his written communication in Form 2 as required under rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 along with a copy of registration.

Reply of the Corporate Debtor

14. The Corporate Debtor has filed its reply and has raised specific objections against the petition stating above averments, which are enlisted hereunder:

- a) It is submitted that the alleged signatures on the alleged agreement and promissory note both dated 01.08.2014 are disputed which is apparently different from the genuine signatures of Late Mr. Sanjay Singhal, the then Director of the Corporate Debtor.
- b) It is also submitted that the averments of the financial creditor is self-contradictory, as on the one hand he has stated to have advanced friendly interest free loan to the Corporate Debtor and on the other hand, it is mentioned that it was agreed between the parties that the corporate debtor shall pay the interest @ 27% p.a. along with the penalty of 3.5% p.m. (which is equal to 42% p.a.) thereby taking the total rate of interest of 69% p.a. which is beyond imagination and not possible in the business in any manner.
- c) The Corporate Debtor submitted that the status of the Financial Creditor is that of a home buyer and he is not a Financial Creditor within the provisions of Insolvency and Bankruptcy Code, 2016.



- d) It is submitted that the wife of Financial Creditor Mrs. Pallavi Rastogi paid an amount of Rs. 15,00,000/- on 18.06.2014 vide cheque no. 214840 towards booking of 3 flats with the Corporate Debtor. The amount of Rs. 15,00,000/- has also been paid back to his wife Mrs. Pallavi Rastogi on 15.02.2016 vide cheque no. 735347 drawn on Punjab and Sind Bank Ghaziabad Branch issued by the Corporate Debtor.
- e) It is submitted that the issuance of 4 cheques all in sum of Rs. 4,38,750/- have been procured wrongfully and illegally by the financial creditor from Mr. Sanjay Singhal with whom the financial creditor had close relations.
- f) It is submitted that the payment of Rs. 45,00,000/- (Rupees Forty-Five Lakhs Only) made by the Corporate Debtor to the Financial Creditor was towards principal amount and not towards interest which is also evident from the fact that no TDS was deducted on the said amount whereas on payment of interest amount it is mandatory to deduct the TDS.
- g) It is submitted that the amount of Rs. 65,00,000/- was not a friendly loan but the same was paid by the Financial Creditor towards booking of 3 flats and on the impugned amount the Corporate Debtor had paid and deposited the service tax at the relevant time which clearly establishes the nature of the impugned sum as business receipt.
- h) It is further submitted that the present application is barred by limitation as the alleged agreement is dated 01.08.2014 and the



amount was to be paid within a period of 12 months from the date of agreement i.e. 01.08.2015, which if treated as date of default, the limitation expired on 01.08.2018 however, the present petition has been filed in the month of July 2020.

Rejoinder of the learned Counsel in reply to the Corporate Debtor

15. It is submitted on behalf of the Applicant herein that the agreement and promissory note dated 01.08.2014 are duly notarized before the Government appointed notary officer on 01.08.2014 and the same have been witnessed before two witnesses, i.e. Mr. Nipun Gulati and Mr. Chandra Kumar Rastogi. Even the stamp paper is dated 30.04.2014. Therefore, it cannot be alleged that the said documents are forged or fabricated.

16. It is further submitted that the said amount was advanced interest free for considerable period of time. Later, when the Corporate Debtor expressed its willingness to extend the time period, then it was decided that the monies will be advanced to the Corporate Debtor against payment of interest.

17. The Corporate Debtor has not placed any document on record such as application form, allotment letter, builder buyer agreement, etc., to show that the Financial Creditor was a home buyer. The transaction of Mrs. Pallavi Rastogi and the Corporate Debtor has nothing to do with the Financial Debt in the present petition.



18. That even after re-payment of Rs. 45,00,000/- towards the principal amount, the balance principal amount and unpaid interest aggregates above Rs. 1 crore.
19. It is submitted that as mentioned in the clause 3 of the agreement dated 01.08.2014 the interest on the loan amount was payable on the quarterly basis, so the Corporate Debtor issued post-dated cheques each of Rs. 4,38,750/-. However, on the request of the Corporate Debtor, the said cheques were not presented by the Financial Creditor on the due dates and as Corporate Debtor represented that he will pay the entire interest amount at the end of the term of the loan agreement.
20. It is submitted that the sum of Rs. 45,00,000/- was adjusted towards payment of principal amount of Rs. 65,00,000/- and therefore, no question arises of charge of or payment of income tax on the said amount of Rs. 45,00,000/- received from the Corporate Debtor. There is no requirement in law to deduct TDS on payment of principal amount of loan.
21. It is submitted that the interest and the penalty continue to accrue every month and the cause of action was continued in favour of the Financial Creditor as the part payment of Rs. 10,00,000/- on 12.07.2017 extended the period of limitation in terms of section 18 of the Limitation Act, 1963.
22. It is submitted that the Financial Creditor is not in the business of money lending and therefore, does not require a license under Punjab Registration of Money Lenders Act, 1930.



Analysis and Findings

23. We have heard both the parties and perused the case records.

24. The entire case of the Financial Creditor is based on the Loan Agreement and the Promissory Note dated 01.08.2014, validity of which is questioned by the Corporate Debtor. Both the said Agreement and the Promissory Note dated 01.08.2014 have been signed by one Shri Sanjay Singhal, as Director of the Corporate Debtor, who has since passed away. It is pertinent to note that the agreement dated 01.08.2014 on which reliance is placed by the Financial Creditor is unsupported by the Authority letter or Board Resolution of the Company namely M/s Charms India Private Limited to show that the money borrowed and its covenants were with the consent of the Board of the Corporate Debtor. It is pertinent to note that as per the provisions of the Section 179(3) of the Companies Act, 2013, a resolution passed by the Board or a delegation of power to borrow money to a Director or Principal Officer is required to borrow money. The relevant provision is extracted hereinafter for ready reference: -

*“Section 179 (1) ******

*(2) ******

(3) “The Board of Directors of a company shall exercise the following powers on behalf of the company by means of resolution passed at meetings of the Board, namely: -

*(a)******

*(b) ******



(c) *****

(d) to borrow monies;

(e) to invest the funds of the company;

(f) to grant loans or give guarantee or provide security in respect of loans;

(g) *****

(h) *****

(i) *****

(j) *****

(k) *****

Provided that the Board may, by a resolution passed at a meeting, delegate to any committee of directors, the managing director, the manager or any other principal officer of the company or in the case of a branch office of the company, the principal officer of the branch office, the powers specified in clauses (d) to (f) on such conditions as it may specify;”

XXXXXXXXXXXXXX

However, no such authorisation/delegation forms part of the impugned Agreement.

25. The terms of the agreement are also heavily loaded in favour of the applicant including payment of interest including penal interest at



the rate of 69% per annum which no prudent business man can agree in normal course of business. This becomes particularly important in view of the fact that no authorisation by the Board of Directors of the Corporate Debtor has been placed on record to show that such agreement which is heavily loaded in favour of the applicant herein was approved by the Board of the Corporate Debtor. Moreover, no such authorization by the Board Resolution of the Company is available on record or has been placed by the Financial Creditor to support the validation of his claim in respect of charging of interest @27% p.a. and penal interest @ 3.5 per month.

26. An extract of the ledger account of the applicant in the books of the Corporate Debtor for the period 01.04.2013 to 31.08.2022 has been placed on record which is reproduced here under:

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CHARMS INDIA PRIVATE LIMITED																
KH 1056, VILLAGE NOOR NAGAR RAJ NAAGR EXTN GHAZIABAD, GST No 09AAAAC6218R1Z7																
LEDGER ACCOUNT: ANURAG RASTOGI																
FROM 01.04.2013 TO 31.08.2022																
S.NO.	FLAT NO.	NAME OF CUSTOMER	BOOKING DATE	SV WITHOUT TAX	DATE OF RECEIPT	AMT. RECD.	SERVICE TAX/GST	BASIC	CHQ NO.	BANK	DATE OF REFUND	AMT PAID	SERVICE TAX/GST	BASIC	CHQ NO.	BALANCE TO BE REFUNDED
1	D-1601	ANURAG RASTOGI	01.02.2014	31,18,825	21.09.2013	2000000	59948	1940052	895231	HDFC BANK	11.07.2017	1000000	29974	9,70,026	001359	
											01.04.2020	1000000	29974	9,70,026	T/F TO B-2204	
						2000000	59948	1940052				2000000	59948	1940052	BALANCE AS ON 25.08.2022	0
2	E-1901	ANURAG RASTOGI	01.02.2014	34,63,750	01.09.2013	2500000	74935	2425065	895227	HDFC BANK	20.05.2016	2500000	74935	2425065	545728	0
						2500000	74935	2425065				2500000	74935	2425065	BALANCE AS ON 25.08.2022	0
3	B-2204	ANURAG RASTOGI	18.06.2014	47,65,000	18.06.2014	2000000	59948	1940052	000007	HDFC BANK	20.05.2016	1000000	29974	9,70,026	545728	
					01.04.2020	1000000	29974	9,70,026	T/F FROM D-1601							
						3000000	89922	2910078				1000000	29974	9,70,026	BALANCE AS ON 25.08.2022	2000000

For CHARMS INDIA PVT. LTD.
Auth. Signatory

27. The above extract of Ledger of the Corporate Debtor shows that the amounts paid by the applicant herein was in respect of specific



flats no. D-1601, E-1901 and B-2204 respectively for which payment of Rs. 20,00,000/- (Rupees Twenty Lakhs Only), Rs. 25,00,000/- (Rupees Twenty-Five Lakhs Only) and Rs. 20,00,000/- (Rupees Twenty Lakhs Only) respectively was made through cheques no. 895227, 895231 and 000007 dated 01.09.2013, 20.09.2013 and 15.06.2014. This also gets corroborated from Clause 14 of the impugned Agreement wherein property details have been incorporated in respect of 3 flats with the following covenant:

“PROPERTY DETAILS: -

2 (Two) Flats of 975sqft and 1 (one) Flat of 850 sqft in forthcoming project of First party/Borrower namely “Charms Castle” Khasra No 1056 & 1099, Noor Nagar (Main 6 Highway, NH-58, Raj Nagar Etnx., Ghaziabad).

During the currency period of the present loan agreement, the First Party/Borrower shall not sell/transfer/alienate/part with possession or create any third party interest in the aforesaid property without the permission of the Second Party/Lender & in case of any default by the First Party/Borrower in repayment of the loan or the interest amount, the Second Party/Lender shall be entitled to seek the attachment of the aforesaid property & sell the same for recovery of its dues”.

Therefore, it appears that the monies were paid to the Corporate Debtor for investment into the nature of the buy-back agreement.

28. From the record we find that out of the principal amount sum of Rs. 20,00,000 (Rupees Twenty Lakhs Only) is outstanding, but the amount as claimed is Rs. 3,18,36,814/- and the difference is the interest @ 27% p.a. along with the penalty of 3.5% per month (which is equal to 42% p.a.) thereby the total rate of interest of 69% p.a. which is exorbitant and usurious without any doubt. In general business parlance, we are unable to understand how a prudent business man can enter into an agreement having such extortionate



covenants. Therefore, it raises suspicion regarding the validity and authenticity of the agreement which is duly raised by the Corporate Debtor. We have also observed that no Board Resolution as required under Section 179(3) of the Companies Act, 2013 is placed on record to establish that Late Sanjay Singhal was authorised by the Corporate Debtor to enter into the impugned Agreement providing for 69% interest in favour of the Applicant. Therefore, the legal validity of the impugned agreement is questionable also.

29. In a summary proceeding like IBC, it is a settled law that this Adjudicating Authority cannot go into the question of ascertaining the validity and authenticity of the agreement as the jurisdiction lies with the civil court. Therefore, we being in a summary proceeding cannot go into the question of determining the authenticity of the signatures. However, as observed above, in the absence of Board Resolution, the Applicant has failed to establish the legality of the said agreement.

30. Moreover, from the ledgers we observe that the only a principal amount of Rs. 20,00,000/- (Rupees Twenty Lakhs Only) is outstanding, which is also admitted by the Applicant but he has also claimed interest of above Rs. 2.98 Cr. Therefore, considering the present facts and circumstances in which the application is filed we observe that the main motive behind filing the present petition is only to recover the money claimed as the exorbitant interest and not for the resolution of insolvency of the Corporate Debtor.

31. We are of the view that CIRP cannot be initiated on the application filed by the Financial Creditor who has based his claim on



a questionable agreement with exorbitant interest rate not supported with any Board's Authorisation to the Director to enter into such an Agreement.

32. In this regard, reference is made to the Hon'ble NCLAT's Judgment in '**Subha Sharma Suspended Board of Director Vs. Mansi Brar Fernandes** [Company Appeal (AT)(Insolvency) No. 83 of 2020], wherein Hon'ble NCLAT examined the terms of the MoU and observed that at the end of 12 months period, the 'Corporate Debtor' would buy-back the apartments and refund the amount paid together with premium and held that it was a 'lucrative Agreement' for the investor and therefore the Allottee is a 'speculative investor' and set aside the Admission Order of the Adjudicating Authority.

33. If we consider the case in hand in the light of aforesaid decision, while applying the aforementioned fundamental principles to the definition occurring in Section 5(7) and 5(8) of the Code, we do not have any doubt that the Applicant herein is only a 'speculative investor' claiming for a 69% interest which is exorbitant interest and therefore does not fit in as a Financial Creditor and hence the interest amount in Part IV of Application does not qualify to become financial debt as per the provisions of the Code. It is our experience that recovery sought through insolvency proceedings had been frequent corollary to non-payments of returns as promised in investments.

34. We have clearly noted that the IBC is not a forum for recovery of amount and we are clearly of the view that the petitioner is utilizing the process of IBC to facilitate recovery whereas the primary focus of



IBC is to ensure revival and continuation of the Corporate Debtor, and to protect it from Corporate Death.

35. The scope of initiation of CIRP has been clearly delineated by the Hon'ble NCLAT in ***Binani Industries Ltd. vs Bank of Baroda and Ors.***, [Company Appeal (AT)(Insolvency) No. 82 of 2018 dated 14.11.2018 wherein Hon'ble NCLAT observed and held that Insolvency and Bankruptcy Code, 2016 is for reorganization and Insolvency Resolution of 'corporate persons'; it is not a sale that is selling or buying the 'Corporate Debtor'; it is not an auction, it is not a recovery and it is not a liquidation.

36. In view of the above facts and circumstances, we held that the instant application bearing **CP (IB) No. 249(ND)/2021** is not maintainable and therefore stands **dismissed**.

Sd/-
DR. BINOD KUMAR SINHA
MEMBER (T)

Sd/-
MR. P. MOHAN RAJ
MEMBER (J)