

IN THE NATIONAL COMPANY LAW TRIBUNAL,
SINGLE BENCH, CHENNAI

CP/18/(IB)/CB/2018

Under Section 7 of the Insolvency and Bankruptcy Code
2016 R/W Rule 4 of the Insolvency and Bankruptcy
(Application to Adjudicating Authority) Rules, 2016

In the matter of

Mr. P. B. Radhakrishnan

..... Financial Creditor

Vs.

M/s. Deleo Construction Private Limited

..... Corporate Debtor

Order delivered on 9th of July, 2018

CORAM:

CH. MOHD SHARIEF TARIQ, MEMBER (JUDICIAL)

*For Financial Creditor : Ms. Preethi A. Arasu for M/s. S. R. Rajagopal
For Corporate Debtor : Mr. K. Moorthy, Counsel*

ORDER

Per: CH MOHD SHARIEF TARIQ, MEMBER (J)

1. Under adjudication is an Application that has been filed by Mr. P. B. Radhakrishnan (hereinafter referred to as 'Financial Creditor') under Section 7 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 against M/s. Deleo

Construction Private Limited (hereinafter referred to as 'Corporate Debtor'). The prayer made is to admit the Application, to initiate the Corporate Insolvency Resolution Process against the Corporate Debtor, declare moratorium and appoint Interim Resolution Professional (IRP) under the Insolvency and Bankruptcy Code, 2016 (I&B Code).

2. Heard the Counsels for the Financial Creditor, and the Corporate Debtor, and perused the record.

3. The Financial Creditor has claimed an amount to the tune of Rs.3,08,46,911/- till date, being Rs.2,01,01,269/- as principal amount and Rs.1,07,45,642/- as interest calculated at 24% p.a., as outstanding against the Corporate Debtor.

4. The case of the Financial Creditor is that the Corporate Debtor viz., M/s. Delco Construction Private Limited had availed financial assistance from ING Vysya Bank Limited (now amalgamated with M/s. Kotak Mahindra Bank Limited). In consideration of

the said financial assistance, the Financial Creditor viz., Mr. P. B. Radhakrishnan, the Managing Director viz., Mr. Vasanthakirshnan and the Director viz., Mrs. Kanchana of the Corporate Debtor stood as guarantors by executing Guarantee Agreement in favour of M/s. Kotak Mahindra Bank Limited. Besides above, the Financial Creditor viz., Mr. P. B. Radhakrishnan, has created equitable mortgage of his ancestral property as collateral security in favour of M/s. Kotak Mahindra Bank Limited for the loan availed by the Corporate Debtor viz. M/s. Deleo Construction Private Limited by deposit of title deeds. The copy of the Home Equity Loan Sanction Letter dated 15.02.2012 is placed at pages 88 to 90 of the typed set filed with the Application, wherein in-principle sanctioned details such as name of the borrower/co-borrowers, primary security provided and repayment period of the loan and rate of interest are mentioned.

5. It is stated by the Financial Creditor that he ceased to be the Director of the Corporate Debtor from the year 2012 owing to the fact that the other officials

in the Corporate Debtor have forbidden him from taking part in the affairs of the Corporate Debtor and kept him in dark.

6. It is stated that the Financial Creditor was shocked to receive the Demand Notice dated 30.09.2015 issued under Section 13(2) of the SARFAESI Act, and only thereafter, the Financial Creditor came to know that the loan account of the Corporate Debtor has been classified as Non-Performing Asset (NPA) and was due a sum of Rs.1,30,52,769.22p. The copy of the 13(2) Notice is placed at pages 91 to 94 of the typed set filed with the Application. It is further stated by the Financial Creditor that only on receipt of the Notice under Section 13 (2) of the SARFAESI Act from the Bank, the Financial Creditor came to know that the Corporate Debtor had not made due repayments.

7. Consequent upon the issuance of Demand Notice, the Bank issued Possession Notice dated 24.02.2016 under Section 13(4) of the SARFAESI Act.

the copy of which is placed at pages 97 and 98 of the typed set filed with the Application, and subsequently Sale Notice dated 26.04.2016 for bringing the property of the Financial Creditor for sale was issued to realise the amount borrowed by the Corporate Debtor. The copy of the Sale Notice is placed at pages 99 to 102 of the typed set filed with the Application.

8. The Financial Creditor further stated that on various occasions from 03.05.2015 to 31.10.2015, the Financial Creditor has deposited amounts from his personal account amounting to a sum of Rs.34,48,500/- on behalf of Corporate Debtor towards repayment of the loan borrowed from M/s. Kotak Mahindra Bank Limited on request of the Managing Director, who promised to return the amount at the earliest. The copy of Challans dated 31.08.2015 and 31.10.2015 are placed at page 105 of the typed set filed with the Application. The Financial Creditor has further stated that he has also made payments from his Credit Card for a sum of Rs.10 Lakhs on behalf of

the Corporate Debtor towards repayment of the loan availed by the Corporate Debtor.

9. Besides above, the Financial Creditor has stated that, he has filed an Application SA 67/2016 before DRT-II, Chennai to set aside the Sale Notice dated 26.04.2016 and the sale by way of an e-auction that was to be held on 31.05.2016. The DRT, vide its Order dated 13.05.2016 has granted stay subject to payment of 20% of the amount on or before 27.05.2016. The copy of the stay Order passed by the DRT is placed at page 45 of the typed set filed with the Application. The Financial Creditor has stated that the conditional order passed by the DRT-II, Chennai was complied with by paying Rs.26,00,000/- in favour of M/s. Kotak Mahindra Bank Limited. The copy of the Demand Draft drawn on ICICI Bank for Rs.26,00,000/- is placed at page 46 of the typed set filed with the Application.

10. It is stated that the Financial Creditor has been put to hardship. The substratum of the Corporate

Debtor has substantially eroded and it is not functioning as of now.

11. The Corporate Debtor has filed the Counter Affidavit on 15.02.2018 through its Director viz., S. Vasanthakrishnan, who has stated that the Application filed by the Financial Creditor under Section 7 of the I&B Code, 2016 is neither maintainable in law nor on facts of the case. Therefore, the Application is liable to be dismissed *in limine*. However, it has been admitted that the Corporate Debtor availed a Term Loan from ING Vysia Bank (now Kotak Mahindra Bank) for a sum of Rs.1.50 Crores. The Corporate Debtor has so far remitted to an amount of Rs.63,33,919/- towards the repayment of the loan. Since few instalments were due, the Bank has initiated action under SARFAESI Act against the secured assets of the Corporate Debtor.

12. It is stated in the Counter that the Petitioner does not come under the purview of the definition of "Financial Creditor" as he is one of the officers of the Corporate Debtor who also stood as 'guarantor' to avail

the financial facility from the Bank. It is denied that the Financial Creditor has resigned from the Board of the Corporate Debtor and stated that the Financial Creditor has not submitted any resignation to the Corporate Debtor and the Petitioner is still associated with the Corporate Debtor.

13. It is also denied that funds have siphoned off from the Corporate Debtor. The Financial Creditor has joined the Corporate Debtor as General Manager in the year 2009 and was inducted in the Board of the Corporate Debtor during 2010. He canvassed the business projects located at various parts of the country from Siemens Limited and other sources and due to which the Corporate Debtor incurred a heavy loss, and in order to streamline the business, the Corporate Debtor had to seek financial assistance from the Bank. It is further stated that the Corporate Debtor suffered a loss of Rs.0.15 Crore on account of the mismanagement of the Financial Creditor.

14. It is averred in the counter that the Financial Creditor has not made any payments as alleged in the Application. If at all any payment is made, it is a gratuitous payments and it is not a debt as per the Insolvency Code. It is denied by the Corporate Debtor that the Financial Creditor has transferred funds to the Bank from his accounts to the tune of Rs.34,48,500/-, and also denied the payments of Rs.10 Lakhs through credit card by the Financial Creditor on various occasions. It is stated that the Financial Creditor has no cause to file the Application and the Financial Creditor has not made any demand towards his claim nor filed invoices in support of his Application. Further, the Financial Creditor has not added the Bank as a party for the best reasons know to him. As per the Respondent, the Application is liable to be dismissed for want of non-joinder of the necessary party.

15. The Counsel for the Corporate Debtor in support of his arguments has cited the following judgements;

i). **Sangramsinh P. Gaekwad and Ors. Vs. Shantadevi P. Gaekwad (dead) thr. Lrs. & Ors,** reported in AIR 2005 SC 809 and

ii). **Dale and Carrington Invst. (P) Ltd. and Ors. Vs. P, K. Prathapan and Ors,** reported in AIR 2005 SC 1624.

In the above quoted rulings it has been laid down that '*exercise by directors of fiduciary powers for the purpose other than those for which they were conferred is invalid.*' It has further been laid down that '*a person bound in fiduciary character is required to protect the interests of other persons and cannot make a pecuniary gain for himself. He must act for the paramount interest of the Company.*'

The Counsel for the Corporate Debtor has submitted that the principle laid down in the above noted cases is applicable to the present case. In this case, the Financial Creditor has stated that he ceased to be the Director of the Corporate Debtor from the year 2012 owing to the fact that the other officials in the Corporate Debtor have forbidden him from taking part in the affairs of the Corporate Debtor and kept him in dark. The Counsel for the Corporate Debtor has submitted that the Applicant / Financial Creditor is

still a Director but he has not shown any documentary proof to support his contention. However, a Financial Creditor, being a director, is not barred from invoking the provisions of I&B Code, 2016. When there is proof of the existence of default on the part of the Corporate Debtor, a Financial Creditor can invoke the provisions Section 7 of I&B Code, 2016 against the Corporate Debtor to initiate the CIRP i.e., a course of action provided by law, provided the Applicant is falling within the purview of the definition of "*Financial Creditor*" as provided under Section 5 (7) of the I&B Code, 2016, and the debt in question is falling within the purview of the definition of "*Financial Debt*" as provided under Section 5 (8) of the Code 2016. In this case both the conditions are fulfilled by the Applicant/*Financial Creditor*. Therefore, the plea taken by the Counsel for the Corporate Debtor is devoid of merits and stands rejected.

16. During the course of arguments, the Counsel for the Corporate Debtor has admitted that the Financial

Creditor has paid Rs.26 Lakhs on 25.05.2016 to make compliance with the Order dated 13.05.2016 passed by the DRT-II, Chennai in SA67/2016 titled Mr. P. B. Radhakrishnan Vs. M/s. Kotak Mahindra Bank Ltd. However, he has denied the other payments claimed to have been made by the Financial Creditor as per the documentary evidence placed at pages 47 to 87 and 105 of the typed set filed with the Application. But, the Counsel for the Corporate Debtor has not produced any proof to rebut the documentary evidence that has been placed on record by the Financial Creditor.

17. In view of the facts and circumstances and the legal position stated above, the application of the Financial Creditor is complete in all respect. The Financial Creditor has also proposed the name of IRP after seeking consent in Form 2 which is placed at pages 106 and 107 of the typed set filed with the Application.

18. In the light of the discussion made above and after examining the record, this Adjudicating Authority has ascertained the existence of a default on the basis of the evidence produced by the Financial Creditor and the Corporate Debtor fail^{ed} to pay the amount of loan *h* borrowed from the bank. The Financial Creditor has fulfilled all the requirements of law and has also proposed the name of IRP after obtaining the written consent in **Form-2**. Therefore, CP/18/(IB)/CB/2018 is admitted and the commencement of the Corporate Insolvency Resolution Process is ordered which ordinarily shall get completed within 180 days, reckoning from the day this order is passed.

19. Mr. Pathukasahasram Raghunathan Raman is hereby appointed as IRP, as has been proposed by the Financial Creditor. There is no disciplinary proceeding pending against the IRP as evidenced from Form-2. The IRP shall file the declaration disclosure statement in the Registry of NCLT, Chennai, within two working days from the date of the receipt of this order. The IRP *h*

is directed to take charge of the Respondent Corporate Debtor's management immediately. He is also directed to cause public announcement as prescribed under Section 15 of the I&B Code, 2016 within three days from the date the copy of this order is received, and call for submissions of claim in the manner as prescribed.

20. The moratorium is hereby declared which shall have effect from the date of this Order till the completion of corporate insolvency resolution process, for the purposes referred to in Section 14 of the I&B Code, 2016. It is hereby ordered to prohibit all of the following, namely:

- (a) The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, 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 Securitisation 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.

21. The supply of essential goods or services of the Corporate Debtor/Guarantor shall not be terminated or suspended or interrupted during moratorium period. The provisions of Sub-section (1) of Section 14 shall not apply to such transactions, as notified by the Central Government.

22. The IRP shall comply with the provisions of Sections 13 (2), 15, 17 & 18 of the I&B Code. The Directors of the Corporate Debtor, its promoters or any person associated with the Management of the Corporate Debtor are/is directed to extend all assistance and cooperation to the IRP as stipulated.

under Section 19, so that he could discharge his functions under Section 20 of the I&B Code, 2016.

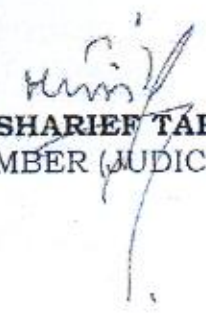
23. The Financial Creditor and the Registry are directed to send the copy of this Order with immediate effect to IRP, so that he could take charge of the Corporate Debtor's assets etc., and make compliance with this Order as per the provisions of I&B Code, 2016. The address details of the IRP are as follows:-

Mr. Pathukasahasram Raghunathan Raman,
Reg. No: IBBI/IPA-002/IP-N00295/2017-18/10896
Flat 'C' Ground Floor,
Srishas Kamalam Apartments,
93, Sivan Koil South Street,
Vadapalani, Chennai – 600 026.

24. The Registry is directed to communicate this Order to the Financial Creditor and the Corporate Debtor with immediate effect.

25. The Order is pronounced in open Court.

P.ATHISTAMANI


[CH. MOHD SHARIEF TARIQ]
MEMBER (JUDICIAL)