

In the National Company Law Tribunal
Mumbai Bench.

C.P.(IB)-292/(MB)/2018

Under Section 7 of Insolvency & Bankruptcy Code, 2016

In the matter of

Mr. Rajendra Bandal : Petitioner/ Financial Creditor

V/s

M/s. Forever Entertainment Private Limited : Respondent/ Corporate Debtor

Heard on : 16.01.2019
Order delivered on : 21.01.2019

Coram:

Hon'ble Shri M.K. Shrawat, Member (Judicial)

For the Petitioner(s) : 1. Mr. Navin Arora, Advocate.

For the Respondent(s) : 1. Mr. Sheelang Shah, i.b. Abhijeet Mahadeokar,
Advocate.

Per M.K. Shrawat, Member (Judicial).

ORDER

1. A Petition is filed in Form No.1 on 21.02.2018 by Mr. Rajendra Bandal, in the capacity of '**Financial Creditor**', u/s.7 of The Insolvency & Bankruptcy Code, 2016 to initiate Corporate Insolvency Resolution Process against M/s. Forever Entertainment Private Limited, (**FEPL**) Pune, '**Corporate Debtor**' for claiming a Financial Debt of ₹29,84,768/- and the bifurcation is that the Principal amount is ₹10,01,000/- and rest is Interest thereon as per the calculation hereunder in following paragraph.

2. Brief particulars of the case are as under:-

Submission from the side of the Petitioner/ Financial Creditor:-

2.1. On 23.04.2012, the Petitioner/ Creditor had entered into a Memorandum of Understanding for purchasing 1334 sq. fts. specific area in a Multiplex 6 Screen Theatre Mega Premises having retail space of about 2 lakh sq. ft. (built-up) to be

constructed at Hinjewadi Infotech Park, Pune, on payment of total amount of ₹2 Crores as agreed therein. It was agreed that 15% of the Sale Value shall be paid within 15 days on signing of MoU, i.e. up to 10th May, 2012. Next 85% of the Sale Value to be paid on *pro rata* basis after signing of Sale Agreement.

2.2. Thereafter, the Petitioner paid part-payment of ₹10,01,000/- pursuant to the terms and conditions agreed therein. The Respondent Debtor was to deliver the said specific space admeasuring 1334 sq. fts. to the Petitioner. It is alleged that vide Letter dated 27.06.2012, the Respondent Debtor expressed its inability to deliver the said specific space in scheduled property. It is further alleged that the Respondent had requested vide Letter dated 15.09.2012 **to convert the 'Advance' into 'Loan'**. As a consequence, the Petitioner and Respondent entered into an Agreement viz. **"Debt Settlement Agreement"** dated **30.10.2012**, according to which the Respondent agreed to repay the entire balance amount of ₹10,01,000/- Principal + Interest @ 18% till the date of repayment. Relevant portions of Terms and Conditions of the Agreement signed are reproduced below:-

"ARTICLE 1

DEFINITIONS AND INTERPRETATION

<i>"Event of Default"</i>	<i>Means failure by the Borrower to pay Lender the entire outstanding amount which included Principal + interest as mentioned below on or before 30-st October 2015;</i>
---------------------------	--

ARTICLE 2

(Not Printed)

ARTICLE 3
COVENANTS

- (A) *The Borrower hereby unconditionally admits its liabilities to the Lender for the Outstanding Amount which comprises of principal Amount of Rs.10,01,000.00 (Rs. Ten Lacs One Thousands only) & Compounding interest @ 18% p.a. till the date of the repayment in full. The compounding Interest calculation will be considered from June 27, 2012 (The date when FEPL first communicated the inability to perform their obligation as per the MOU dt.April 23, 2012.)"*

2.3. It is alleged that the Respondent failed and neglected to repay the entire amount as per the "Debt Settlement Agreement" and has not repaid any amount to the Petitioner till date.

2.4. The First date of default occurred was allegedly on 27th June 2012 and then on 31st October, 2015 and thereafter the default is continuing. A Statement of Interest compounded yearly @ 18% added at the end of each year is placed on record, reproduced below:-

"(Interest compounded yearly @ 18% added at the end of each year):"

Compounding Interest calculation is from June 27, 2012 as stated in Settlement Agreement.
Principal Amount is Rs. 10,01,000

Year	Year Interest	Total Interest	Balance
1	180,180.00	180,180.00	1,181,180.00
2	212,612.40	392,792.40	1,393,792.40
3	250,882.63	643,675.03	1,644,675.03
4	296,041.51	939,716.54	1,940,716.54
5	349,328.98	1,289,045.51	2,290,045.51
6	412,208.19	1,701,253.71	2,702,253.71
7	282,515.07	1,983,768.78	2,984,768.78

(Total Amount of Claim as on February 2018: 29,84,768.78)

3. Bank Statement of the Financial Creditor for the period from 01.04.2012 to 31.03.2013 from ICICI Bank is on record, to complete as one of the requirement of the Code and also to demonstrate that a payment of ₹5,01,000/- was made on 25.04.2012 through RTGS transferred in the account of Forever Entertainment Pvt. Ltd. and further a sum of ₹5 Lakhs transferred on 12.05.2012.

4. Vide letter November 7, 2012, the Financial Debtor has acknowledged the impugned Debt of ₹10,01,000 + Accrued Interest against the advance received, which was converted into loan through a Debt Settlement Agreement Dated October 30, 2012 between Mr. Rajendra Bandal & M/s. Forever Entertainment Pvt. Ltd. According to a Letter of Balance Confirmation dated 31.03.2013, the Corporate Debtor had acknowledged that "*payable balance in our books towards Loan Account of Mr. Rajendra Bandal as on 31 March 2013, would be ₹11,36,135.00*".

5. As the outstanding Debt amount of ₹10,01,000/- + Interest thereon was not repaid, the Financial Creditor issued a Demand Letter dated February 2, 2018 upon the Corporate Debtor demanding the payment.

Submissions from the side of the Respondent

6. From the side of the Respondent Debtor it is submitted that the Petitioner has suppressed material facts which ultimately resulted into default in making the payments to the Financial Creditor. According to the Respondent Debtor, the impugned 'default' in payment occurred due to the alleged fraud committed by the erstwhile Directors of the Corporate Debtor viz. Mr. Aniket Kulkarni and Mr. M.R. Dange.

6.1. It is stated that in the year 2007 Mr. Aniket Kulkarni approached Mr. Sunil Kumbhar and Mrs. Vandana Kumbhar through Mr. M.R. Dange and represented that he is a founder member of Forever Entertainment Pvt. Ltd., i.e. the Corporate Debtor. The Company was carrying out business of development, construction and operation to develop a land for the purposes of multiplex mall at Hinjewadi, Pune viz. being survey No.1590/1 admeasuring about 40 acres situated at Adarash Nagar, Village Hinjewadi, Tal. Mulshi, Dist. Pune.

6.2. At the time of entering into this transaction, Kulkarni and Dange had assured that they would carry out development of the said land and in return offered shares of the Corporate Debtor. It was assured that at the relevant time, Kulkarni and Dange would raise the entire capital towards the cost of the said project by their own contribution. Accordingly, Development Agreement dated 18.11.2010 and a Power of Attorney dated 24th November 2010 was executed and Mr. Sunil Kumbhar was inducted as a Director of the Corporate Debtor. The entire day to day business affairs and transactions were looked after by Kulkarni and Dange.

6.3. Since Kulkarni did not start any work for the period of one year and also avoided reasons for the same. The work began in 2010, however, has not been completed till now. Thus the core contention of the Corporate Debtor is on the delay/fraud purportedly committed by the two erstwhile Directors of the Corporate Debtor.

6.4. It is submitted that on coming to know of the fraud perpetrated by Kulkarni and Dange, a police complaint dated 17.05.2013 was filed by Ms. Anita

Kumbhar, a Director of the Corporate Debtor with the Police Inspector of Hinjewadi Police Station, Pune, which was culminated into FIR No.004878 dated 23.05.2013. The said complaint was also marked to the EOW, Pune and Superintendent of Police, Pune. The investigation on the frauds committed by Kulkarni and Dange are still pending enquiry. It is finally pleaded that the default in payment by the Debtor Company had occurred due to the default committed by erstwhile Directors, who have resigned later on and also subject to police action, therefore, the Corporate Debtor Company should not be held responsible for misdeed of a Third party. The Corporate Debtor is not under Statutory obligation to make good of the fraudulent activity of erstwhile Directors. Instead of filing Insolvency proceedings by the Petitioner Mr. Rajendra Bandal, it was proper on his part to file a criminal complaint and recovery suit against those erring persons.

FINDINGS :-

7. Heard the submissions of both the sides. Perused the contents of the Petition as well as the reply of the Respondent in the light of the annexed evidences. On examination of sequence of events, ex facie it is evident that through bank transactions money was transferred from ICICI Bank as per the bank statement on record and the dates of transaction have already been discussed in the foregoing paragraphs. It is also not in dispute, rather admitted factual position that an Agreement was executed by the Debtor Company on one part and the Petitioner on the other part titled as "MoU dated 23.04.2012" through which in unequivocal terms it was agreed upon that the impugned area (*supra*) shall be transferred on completion of the project and to accomplish the undertaking of payment on the part of the Petitioner a schedule was prescribed therein, duly consented by both the sides. The Petitioner has paid the amount of ₹10,01,000/- to fulfil his part of commitment, however, the Respondent Debtor Company had failed to perform its part of commitment. When there was no project was visible the Petitioner had become worried about his investment, hence an alternative suggestion was made from the side of the Debtor to convert the said amount as a Debt on the Company. A deed was executed on 30.10.2012 titled as 'Debt

Settlement Agreement' executed between the Debtor Company as "Borrower" on one hand, and on the other hand, Mr. Rajendra Bandal (Petitioner) as "The Lender". Again there was no ambiguity in the Terms of the said Agreement that the Debtor Company had not been able to fulfil its commitment hence converted the advance into a Loan and promised to pay the liability which was accepted as ₹10,46,000/- with clear specification that the said figure was the outstanding Debt including Interest from 27.06.2012 till that date. As per Clause-9 of the said Deed it is specified that the Borrower had admitted the liability to pay the outstanding Debt to the other side. In short, it was an unqualified acceptance of Debt by the Debtor Company.

7.1. As far as the explanation of the Debtor Company is concerned, the same appears to be an uncorroborated story to avoid the Debt liability. The Debt is duly appearing in the books of the Debtor Company being directly transferred through RTGS in the books of the Company. It is not the case of the Respondent that the money was received by those Ex-Directors, or the money was not transferred in the account of the Company. A dispute between the Directors was an internal matter of the Company. The Debtor Company is a Judicial person subject to legal action. That is why the Petitioner has initiated Insolvency Proceedings against a judicial entity i.e. the Debtor Company in whose books of accounts the Debt in question is duly reflected. If this theory of the Respondents is accepted then no Company shall be made responsible for recovery of the Debt because in every case the affairs of the Company are being managed and controlled by the Directors. A defaulter Company being a Judicial person can be prosecuted independently. The excuse of the Respondent is not convincing and beyond credence.

7.2. In the light of the above discussion and on due perusal of the documents annexed, the Debt is to be qualified as "Financial Debt" as defined under section 5(8) of Insolvency & Bankruptcy Code, 2016. As a result, the Financial Creditor has filed this Application for initiating Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor.

8. Since this is a Petition of "Financial Creditor", therefore, the Insolvency Process shall commence as prescribed under Section 7 of I&BC, 2016. The occurrence of "default" is established. The Financial Debtor has not raised any "dispute". The defence advanced by the Corporate Debtor for causing the 'default' of the impugned Debt amount, revolves on the omissions committed on the part of the two erstwhile Directors of the Respondent Debtor Company.

9. Under the totality of the facts and circumstances mentioned above that the Debt in question is a 'Financial Debt' and that the occurrence of 'default' is recognized, hence considering the state of affairs mentioned *supra* the Petition under consideration deserves to be "Admitted".

10. The Petitioner / Financial Creditor has proposed the name of the IRP **Mr. Jitendra Palande**, 38, 5-3 / D, New Ajanta Avenue, Paud Road, Kothrud, Pune – 411038, Registration No. IBBI/IPA-003/IP-00028/2017-18/10188. The proposed IRP has furnished the requisite Certificate on Form No.2 that no Disciplinary Proceedings is pending. On due consideration, the proposal of appointment of the IRP is hereby confirmed.

11. Upon Admission of the Application and Declaration of "Moratorium" the Insolvency Process such as Public Announcement etc. shall be made immediately as prescribed under section 13 read with section 15 of The Code. The appointed IRP shall perform the duties as an Interim Resolution professional as defined under section 18 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. The IRP shall submit the Resolution Plan for approval as prescribed under section 31 of The Code.

12. It is hereby pronounced that the "Moratorium" as prescribed under Section 14 of the Code 2016 shall come into operation. As a result, institution of any suit or parallel Proceedings before any Court of Law are prohibited. The assets of the Debtor must not be liquidated until the Insolvency Process is completed. However, the

supply of essential goods or services to the Corporate Debtor shall not be suspended or interrupted during "Moratorium Period". This direction shall have effect from the date of this Order till the completion of Insolvency Resolution process.

13. Accordingly, this **C.P.(IB)-292/(MB)/2018** stood "Admitted".

14. The Corporate Insolvency Resolution Process is commenced from the date of this Order.

Sd/-
M.K. SHRAWAT
Member (Judicial)

Date : 21.01.2019
ug