
(2020) 06 NCLT CK 0033

In the National Company Law Appellate Tribunal, Pricipal Bench, New Delhi

Case No : (IB) No. 2845 (ND) Of 2019

Deepraj Investments Pvt. Ltd

APPELLANT

Vs

Sai Precious Traexim Private Limited

RESPONDENT

Date of Decision : 08-06-2020

Acts Referred:

Code Of Civil Procedure, 1908 — Section 156(3)
Indian Contract Act, 1872 — Section 52, 54
Insolvency And Bankruptcy (Application To Adjudicating Authority) Rules, 2016 — Rule 4, 4(3)
Insolvency And Bankruptcy Code, 2016 — Section 7, 7(1), 7(2), 7(5), 7(5)(a), 8, 8(1), 8(2), 9, 14, 15, 16, 17, 18, 20, 21(6A)(a), 21(6A)(b), 31(1), 33
Negotiable Instruments Act, 1881 — Section 138, 141

Citation : (2020) 06 NCLT CK 0033

Hon'ble Judges : Abni Ranjan Kumar Sinha, J;Kapal Kumar Vohra, Member (Technical)

Bench : Division Bench

Advocate : Sushil Aggarwal

Judgement

Abni Ranjan Kumar Sinha, J

1. The present application has been filed on behalf of Applicant claiming to be Financial Creditor under Section 7 of the IBC, 2016.
2. The Financial creditor is registered with RBI as Non-Banking Finance Company (NBFC) vide registration number B. 14.00849 dated 27.07.2002. It is engaged in the business of providing Loans and Advances to business entities and Individuals.
3. The Corporate Debtor is incorporated with the main objects of doing business related to Gems and Jewellery.
4. Brief facts of the case are as follows:
 - i. The Corporate debtor approached the Financial creditor with an application

dated 19.01.2019 requesting for a loan of Rs. 1,00,00,000/- (Rupees One Crore Only) to meet out its short-term capital requirement.

ii. The Financial Creditor sanctioned the aforesaid loan amount vide its sanction letter dated 23.01.2019 in the name of Corporate Debtor. The tenure of loan amount was fixed for six months and term of repayment was bullet payment of entire loan amount at the end of sixth month from the date of disbursement. The Loan agreement dated 29.01.2019 was signed and executed with the Financial Creditor by the Corporate Debtor as Borrower.

iii. It is stated by the Financial creditor that out of Loan Amount, Rs. 35,00,000/- was paid to two creditors of Corporate debtor on the written instruction of Corporate Debtor on its behalf, and Rs. 65,00,000/- was credited in the bank account of Corporate Debtor on 30.01.2019 to 25.02.2019.

iv. Further, the Corporate Debtor had issued post-dated cheques of payment of interest and repayment of principal amount.

v. Further, the Corporate Debtor failed in meeting the payment obligation towards interest and Principal amount as agreed and thus breached the terms and conditions of sanction letter and loan agreement. The cheques No. 482041 dated 01.05.2019 and 482042 dated 01.06.2019 for Rs. 2,00,000/- each given for payment of interest on loan amount were dishonoured on presentation by the Financial Creditor.

vi. Further, the Financial Creditor has initiated criminal proceedings dated 07.08.2019 against the Corporate Debtor and its director under Section 138 read with Section 141 of Negotiable Instrument Act, 1881 for dishonour of aforesaid cheques, before the Court of Ld. Metropolitan Magistrate, Karkardooma Court, Delhi.

vii. Further, cheque No. 482043 dated 01.07.2019 for Rs. 2,00,000/- given for interest amount and cheque No. 482044 dated 01.08.2019 for Rs. 1,00,00,000/- for payment for Principal amount were also dishonoured by the bank of Corporate debtor with remark - STOP PAYMENT on 16.09.2019. The Financial Creditor has served the Corporate Debtor with notice of payment dated 25.09.2019 under section 138 read with section 141 of Negotiable Instrument Act, on dishonour of aforesaid cheques.

viii. Further, notice dated 07.10.2019 was issued by the financial creditor to Corporate Debtor to make payment of Rs. 1,16,79,338.40/- of which the Financial Creditor has not received any reply.

ix. The total amount of debt due is Rs. 1,16,79,338.40/- which includes Rs. 1,00,00,000/- being Principal amount, Rs. 11,20,282.40/- being interest upto 30.09.2019, Rs. 2,41,056/- being penal interest as per Clause 11 of Sanction letter dated 23.01.2019 and Rs. 3,18,000/- being cheque bouncing charges as per clause 13 of Sanction letter dated 23.01.2019.

5. The Corporate Debtor vide reply dated 02.12.2019 contends that:

i. The Financial Creditor failed to disclose the commission of any "default" whatsoever by or on behalf of Corporate Debtor.

ii. Interest charged is in violation of interest rate as decided by RBI as well as Ministry of finance.

iii. The alleged accounts as annexed by the Financial Creditor have not been "certified" as per provisions of the bankers book evidence act.

iv. Mr. Rajeev Aggarwal is well known to one of the Director of Corporate debtor namely Mr. N.K. Arora as he had earlier agreed to purchase the property bearing No. A-14, Lower Ground Floor, New Friends colony, which is owned by Ms. Bani Arora, Wife of N.K. Arora. The said deal was offered 4 years ago and Rajeev Aggarwal had paid some amount towards advance/earnest money. However, the said deal could not be matured as purchaser was unable to pay the settled consideration.

v. In the months of September-October 2018, the said Rajeev Aggarwal offered N.K. Arora that he can arrange funds of Rs. 40 Lacs at present and Rs. 60 lacs after three months at reasonable rate of interest from one entity named as "Deepraj Investment Ltd.", provided the Corporate Debtor willing to sign loan documents of Rs. 1 Crore and some blank cheques.

vi. Rajeev Aggarwal and Financial creditor pretends to help the Corporate debtor subject to the condition that he will personally use the funds of Rs. 60 Lacs for period of three months and thereafter, the same will be returned to the corporate debtor along with interest as payable by the Corporate Debtor to financial creditor.

vii. Rajeev Aggarwal assured that loan documents and security cheques will remain with him and will not be handed over to financial creditor. N.K. Arora, due to dire need of money, accepted the proposal of Rajeev Aggarwal and handed over the blank and semi-blank documents to him on 29.01.2019 in presence of Sh. Manish Mehra Accountant and Mr. Veeresh Kumar.

viii. The actual documents, which need to be executed at the time of disbursement of loan, were not even executed because full amount of loan of Rs. 1 Crore was not in-fact disbursed by the Corporate Debtor.

ix. The financial creditor got transferred Rs. 20 Lacs on 30.01.2019 to the Corporate Debtor. However, on instructions of Rajeev Aggarwal, the corporate Debtor had transferred Rs. 25 Lacs through RTGS, through its sister concerned on 31.01.2019 and 01.02.2019 to "Pine view Portfolio Consultants Pvt. Ltd.".

x. Further, on 07.02.2019, Rs. 20 lacs was transferred by Corporate Debtor to the account of Pine view Portfolio Consultants Pvt. Ltd. and thereafter Rs. 25 lacs was also transferred on 25.02.2019.

xi. In aforesaid manner, a total amount of Rs. 65 lacs was transferred by financial creditor to the account of Corporate Debtor. Balance amount of Rs. 40 lacs remained with the Corporate Debtor against the loan documentation of Rs. 1 Crore as signed and executed by the Director of Corporate debtor.

xii. Despite several requests of Director of Corporate Debtor, Rajeev Aggrwal did not even arrange a single meeting with the Director or authorized representative of Financial Creditor during execution of loan agreement or even thereafter and entire transaction was done by Rajeev Aggarwal for and on behalf of financial creditor.

xiii. The Financial Creditor alongwith his associates insisted the corporate debtor to issue one cheque of Kotak Mahindra Account bearing Account No. 01762000003262 having cheque No. 002557 for an amount of Rs. 1 Crore and another blank cheque No. 002558 with endorsement that "not more than Rs. One Crore" from the personal account of Narendra Kumar Arora, Director of Corporate Debtor.

xiv. After trapping the Director of Corporate Debtor, Rajeev Aggarwal alongwith financial creditor got executed, in advance, various blank and semi blank documents, including loan documents and various semi blank cheques from the Director of Corporate debtor in his office.

xv. It is admitted position on behalf of the financial creditor that as per clause 15 of Annexure to the sanction letter dated 23.01.2019, the "bullet payment of entire loan amount at the end of Sixth months from the date of Disbursement".

xvi. Corporate Debtor had not committed the default in repayment as the financial creditor is required to disburse the total amount i.e. Rs. One Crore.

xvii. On 17.09.2019, the financial creditor has presented the cheque of Rs. One crore and 2 lacs towards loan amount and interest without any intimation and having full knowledge that Corporate Debtor is not liable to pay that amount to financial creditor.

xviii. The Corporate debtor has already filed a complaint on 20.09.2019 vide Diary No. D-31-A dated 20.09.2019 before P.S. New Friends Colony, New Delhi for registration of FIR against Rajeev Aggarwal and Director of Financial Creditor for initiation of appropriate criminal proceedings.

xix. The Corporate Debtor has also filed criminal complaint under Section 156(3) of CPC for direction to the concerned official to register an FIR against the said Rajeev Aggarwal and Director of financial creditor.

xx. It is pertinent to mention that Corporate debtor in lieu of promised disbursement of Rs. 1 crore, only a sum of Rs. 65 lacs has been disbursed and moreover out of Rs. 65 lacs, Corporate Debtor has transferred Rs. 25 lacs to Prime View Portfolio Consultant Pvt. Ltd. In fact, the Corporate Debtor actually received an amount of Rs. 40 lacs only and hence, the corporate debtor as per

Section 52 of the Indian Contract Act is stopped from claiming performance of the terms of the loan agreements from the corporate debtor, on the contrary the corporate debtor is entitled for compensation from the financial creditor as per Section 54 of the Indian Contract Act.

6. We have heard the Learned Counsel for the applicant but no one appeared on behalf of the respondent, despite several adjournment given to the Respondent. Therefore, in course of writing of order, we shall consider the averments made in the reply filed by the Corporate Debtor.

7. Learned Counsel for the applicant in course of his argument submitted that the Corporate Debtor had applied for loan which is enclosed by the applicant as Annexure- A-1 at page 28 of the paper book for the loan amount of Rs. 1 crore, thereafter the loan was sanctioned on 23rd January 2018, the sanction letter is enclosed as Annexure-A-2 at page 37 of the paper book and then a loan agreement was executed, which is at page 46 of the paper book. He further submitted that on the request of the Corporate Debtor, a cheque of Rs. 15 lakhs was issued in favour of Mr. Rajeev Agarwal and a cheque of Rs. 20 lakhs was issued in favour of M/s. Shreshtha Associates Pvt. Ltd and the request letter is at page 72 as Annexure A-4 of the paper book.

8. He further submitted that accordingly, the amount was debited from the account of the applicant and he enclosed the statement of bank account which is at page 73 to 76 of the paper book.

9. He further submitted that the cheques issued by the Corporate Debtor being cheque number 482043 for Rs. 2 lakhs given for interest amount and cheque number 482044 for Rs. 01 crore for payment of principal amount were dishonored when it was presented for encashment and the Financial Creditor had filed the case under the NI Act against the Corporate Debtor. He further submitted that when the amount was not paid, the Financial Creditor had issued a notice dated 07 October, 2019, Corporate Debtor had to make payment of Rs. 11679338.40/-.

10. Although, no one appeared on behalf of the Corporate Debtor but the Corporate Debtor had filed the reply, which we have referred in the aforementioned para.

11. Now in the light of the submission made on behalf of the Financial Creditor and on the basis of averments made in the application as well as the reply filed on behalf of the Corporate Debtor, we find that although, the Corporate Debtor claimed that the present application is not maintainable but in para 7 (c), he admits that he executed the loan agreement of Rs. 01 crore as sanctioned is received by the company and also issued the cheques. In Para-7 (F) of reply, the Corporate Debtor admit that the Financial Creditor got transferred Rs. 20 lakhs on 30th January 2019 to the Corporate Debtor and thereafter Rs. 25 lakhs were also transferred on 25th February, 2019. He further claimed in the same para that total amount of Rs. 65 lakhs were transferred by the Financial Creditor to

the account of Corporate Debtor. He further stated in the reply that the Financial Creditor has not released the entire loan amount. He further stated in Para-7 (L) of the reply that in the sanction letter dated 23rd January 2019 (in clause 15) it is mentioned that bullet payment of entire loan at the end of six (06) months from the debt of disbursement, hence the Corporate Debtor has not committed the default in repayment and so there is no default in repayment of loan.

In the light of the facts mentioned in the reply, when we shall consider the statement of the Learned Counsel appeared for the applicant then we find that admittedly, a loan agreement was executed in between the Financial Creditor and the Corporate Debtor, and the Financial Creditor has disbursed the loan on the request of the Corporate Debtor and that amount has not been paid. Therefore, at this juncture, we would like to refer Section 7 of the IBC, 2016 and the same is quoted below: -Section 7: -

(1) "A financial creditor either by itself or jointly with 1[other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government] may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.

Provided that for the financial creditors, referred to in clauses (a) and (b) of subsection (6A) of section 21, an application for initiation corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such creditors in the same class or not less than ten per cent, of the total number of such creditors in the same class, whichever is less:

Provided further that for financial creditors who are allottees under a real estate project, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten per cent of the total number of such allottees under the same real estate project, whichever is less:

Provided also that where an application for initiating the corporate insolvency resolution process against a corporate debtor has been filed by a financial creditor referred to in the first or second provisos and has not been admitted by the Adjudicating Authority before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019, such application shall be modified to comply with the requirements of the first or second provisos as the case may be within thirty days of the commencement of the said Ordinance, failing which the application shall be deemed to be withdrawn before its admission.]

Explanation. - For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.

(2) The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.

(3) The financial creditor shall, along with the application furnish -

(a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;

(b) the name of the resolution professional proposed to act as an interim resolution professional; and

(c) any other information as may be specified by the Board.

(4) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3): 1 [Provided that if the Adjudicating Authority has not ascertained the existence of default and passed an order under sub-section (5) within such time, it shall record its reasons in writing for the same.]

(5) Where the Adjudicating Authority is satisfied that -

(a) a default has occurred and the application under subsection (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or

(b) default has not occurred or the application under subsection (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:

Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5).

(7) The Adjudicating Authority shall communicate-

(a) the order under clause (a) of sub-section (5) to the financial creditor and the corporate debtor;

(b) the order under clause (b) of sub-section (5) to the financial creditor, within seven days of admission or rejection of such application, as the case may be".

12. At this juncture, we would also like to refer the decision in *Innovative Industries Limited Vs. ICICI Bank* reported in 2018 (1) SCC 407 and the relevant portion of the decision is quote below:

"28. When it comes to a financial creditor triggering the process, Section 7

becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor - it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under subsection (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in part III, particulars of the financial debt in part IV and documents, records and evidence of default in part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under subsection (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.

29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in subsection (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing - i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.

30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable

at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise".

13. Mere plain reading of the provision and the decision referred above show that under Section 7 of IBC, 2016, the Adjudicating Authority to see whether there is a financial debt and default has occurred in repayment of that debt or not, the application is complete or whether any disciplinary proceedings is pending against the proposed RP or not. So far dispute is concerned like Section 9 of the IBC, 2016, in section 7 of IBC, 2016, proceedings, there is no scope to raise the disputes. Therefore, the averments made in the reply regarding the dispute raised by the Corporate Debtor is concerned, in our considered view, is not liable to accepted.

14. When we shall consider the case in hand, in the light of aforesaid provision and the decision, then we find that the application is complete and the loan has been disbursed and the same has not been not paid by the Corporate Debtor, therefore there is default in payment of debt, there is no disciplinary proceedings pending against the RP. Therefore, we have no option but to admit the application under Section 7(5)(a) of the IBC, 2016.

15. Accordingly, this petition is admitted. A moratorium in terms of Section 14 of the IBC, 2016 shall come into effect forthwith staying:-

"(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 debt or 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;

(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.

Further:

(2) The supply of essential goods or services to the corporate debtor as may be specified, shall not be terminated or suspended or interrupted during moratorium period.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(4) The order of moratorium shall have effect from the date of such order till the

completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be."

16. Since, name of IPR has proposed by the Applicant, hence we appoint, Mr. Atul Kumar Jain as IRP, having registration number IBBI/IPA-002/IP-N00734/2018-2019/12266, e-mail id: atulkj@gmail.com and also attached form 2 as Annexure A-15 of the main application. He is directed to take such steps as are mandated under the Code, more specifically under Sections 15, 17, 18, 20 and 21 and shall file his report before the Adjudicating Authority.

17. Operational Creditor is directed to deposit the fee of Rs. 2,00,000/- to meet the immediate expenses of the IRP within two weeks. The same shall be fully accountable by the IRP and shall be reimbursed by the CoC, to the Operational Creditor to be recovered as CIR costs and IRP is directed to follow the rules and regulations. as per Section 15, 16, 17 & 18 of IBC.

18. Registry is directed to communicate the order to the IRP as well both the parties.