(2022) 07 NCLT CK 0058

In the National Company Law Tribunal

Case No : I.A. (IB) No.284/KB/2022 and C.P. (IB)/1379/KB/2020

Rotomac Vinimay Private Limited APPELLANT

Vs

Betwa Villa Private Limited RESPONDENT

Date of Decision : 26-07-2022

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 7, 7(3)(a), 10A
Code of Criminal Procedure, 1973 — Section 156(3)
Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

Citation : (2022) 07 NCLT CK 0058

Hon'ble Judges : Rohit Kapoor, Member (J);Balraj Joshi, Member (T)

Bench : Division Bench

Advocate : Manju Bhuteria, Pradeep Kr. Jewrajka, Pooja Jewrajka, Abhrajit Mitra, Vaibhani Pandey

Final Decision : Disposed Of

Judgement

Balraj Joshi, Member (Technical)

1. The Court is convened via hybrid mode.

2. This is a Company Petition filed under section 7 of the Insolvency and Bankruptcy Code, 2016 ('the Code') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Rotomac Vinamay Private Limited ('Financial Creditor'), represented by Mr. Sushil Kumar Naita duly authorizedby virtue of Board Resolution dated 20 June, 2020 Annexure – B of the Petition at page 13.for initiation of Corporate Insolvency Resolution Process('CIRP') against Betwa Villa Private Limited ('Corporate Debtor').

3. The present Petition was filed on 17 July, 2020 before this Adjudicating Authority on the ground that the Corporate Debtor has defaulted in a sum of Rs.2,59,43,883/- (Rupees Two Crore Fifty Nine Lakh Forty Three Thousand Eight Hundred Eighty Three only), inclusive of interest calculated at 9% upto 30 June,

2020.

4. It is submitted in the Petition, Part – II that the authorized share capital of the Corporate Debtor is Rs.5,00,000/- (Rupees Five Lakh only) with paid up Capital as Rs.4,04,600/- (Rupees Four Lakh Four Thousand Six Hundred only).

5. The date of default is stated to be on 31 January, 2019, when the Financial Creditor called upon the Corporate Debtor to refund the Principal loan along with interest [Page 9 of the Petition].

6. Submissions by theLd. Counsel, Ms. Manju Bhuteria appearing on behalf of the Financial Creditor:

a) The Corporate Debtor was in need of financial assistance and had approached the Financial Creditor, who is an NBFC, for financial assistance by way of loan in the form of Inter Corporate Deposit ('ICD' or 'Loan'). The Corporate Debtor also assured that they would make the payment of interest at 9% per annum every financial year; and will refund immediately upon receiving a demand from the Financial Creditor for the return.

b) Subsequently, the Financial Creditor agreed to disburse the loan as per the requirements of the Corporate Debtor on various dates starting from 29 November, 2016 to 08 March, 2017. During the said period the Financial Creditor provided a total amount of Rs.2,02,50,000/- (Rupees Two Crore Two Lakh Fifty Thousand only).

c) The Corporate Debtor has provided for interest in its books of accounts, but however failed to pay the interest to the Financial Creditor. Although, from time to time the Corporate Debtor assured the Financial Creditor of the Payment of interest and even deducted TDS.

d) The Financial Creditor repeatedly requested the Corporate Debtor to refund the entire loan amount along with interest payable but the Corporate Debtor failed to make payment and the same is still due and payable.

e) On 09 January, 2019, the Financial Creditor by a way of letter [Annexure I at page 45 of the Petition] demanded refund of the Principal mount along with the agreed interest amount, from the Corporate Debtor. However, the Corporate Debtor has not paid the same to the Financial Creditor.

7. Submissions by the Ld. Sr. Counsel, Mr. Abhrajit Mitra appearing on behalf of the Corporate Debtor:

a) In November, 2016, the Corporate Debtor had approached the Financial Creditor for investment in the form of ICD. Thereafter, the Financial Creditor agreed to invest certain funds.The Corporate Debtor had also requested to the Financial Creditor to enter into an agreement but no such agreement was executed.

b) The Financial Creditor for the first time issued a demand invoice via an email dated 08 May, 2020. It is pertinent to mention that as per section 10A of the Code no application for initiation of CIRP of a Corporate Debtor shall be filed for any default arising on or after 25 March, 2019 for a period of six months or such further period, not exceeding one year from such date, as maybe notified.

c) In view of the above section inserted vide notification dated 23 September, 2020, there could not be a default post 25 March, 2020 until such period of extension provided for this purpose under the provisions of the Code. Thus upon realizing that a demand notice dated 08 May, 2020 of Financial Creditor would not entitle the Financial Creditor to initiate the CIRP, hence, the Financial Creditor committed forgery by fabricating a letter dated 09 January, 2019. However, the notice dated 09 January, 2019 was never issued to the Corporate Debtor. Even the seal and signature affixed on behalf of the Corporate Debtor are forged and fabricated by the Financial Creditor.

d) Upon coming across the forged letter dated 09 January, 2019, the Corporate Debtor filed a criminal complaint with the Rabindra Sarovar Police Station, Kolkata. Annexure B of the Reply. On 31 December, 2020, the Respondent also filed an application bearing No.144/2020 under section 156(3) of the CrPC before the Ld. Chief Judicial Magistrate to issue direction upon the police to register an FIR on the Compliant by the Corporate Debtor Annexure C of the Reply. The CJM also directed the Police to file their enquiry report.

e) On 15 January, 2021, the police filed its enquiry report, wherein they have stated that during the enquiry they discovered that the accused Person, i.e., the Financial Creditor has made counterfeit seal of the Corporate Debtor i.e., the Complainant Company and manufactured a forged letter dated 09 January, 2019 by putting the counterfeit seal and forged signature on the document. Annexure E of the Reply at Page 38.It is pertinent to mention that the same letter has been presented before the Adjudicating Authority for the initiation of the CIRP.

f) Subsequently, on 21 January, 2021, the Police registered an FIR against the Financial Creditor for forgery and fabrication of the letter dated 09 January, 2019. The investigation in the said matter is ongoing and the Investigating Agency is yet to file its charge sheet before the CJM Court.

g) It is also pertinent to mention that there is a non-compliance of Section 7(3)(a) of the Code and Part IV (2) of FORM 1 prescribed under the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by the Financial Creditor.

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8. This is an application filed by the Corporate Debtor ('Applicant') with regard to an issue raised by this Adjudicating Authority to the list of charges appearing in the Applicant's/Corporate Debtor's Master Data which is at page 14 of the Section 7 petition in respect of the immovable property even though in the Applicant's/Corporate Debtor's audited accounts there is no immovable property

reflected.

9. The Applicant/Corporate Debtor along with 4 (four) other companies was the owner of a Land at premises No. 43, Diamond Harbour Road, Kolkata - 700038. The Corporate Debtor had an undivided 1/5th share in the said property. All the 5 (five) land owning companies, namely Betwa Villa Private Limited, Betwa Mansions Private Limited, Betwa Heights Private Limited, Betwa Residency Private Limited and Betwa Palace Private Limited (‘five companies’) along with M/s Akshara Ventures LLP (‘Akshara’) entered into a development agreement with one Betwa Cottage Private Limited for construction of a residential building at the said premises. All the five land owning companies including the Applicant/ Corporate Debtor had brought into the stock of the said Akshara each of the co-owners undivided share in the land. That the undivided share of the Applicant/ Corporate Debtor in the said land was brought into the joint stock of Akshara as capital contribution in the said firm would also be evident from the audited annual accounts of the Applicant/Corporate Debtor for the Financial Year 2011-2012.

10. The said Betwa Cottage Private Limited obtained a construction finance loan to the tune of Rs. 15,00,00,000/- (Rupees fifteen crores only) from LIC Housing Finance Limited (‘LIC’) on 16 July 2013. It is stated that the said loan was secured by a mortgage in the said land situated at Premises No. 43, Diamond Harbour Road, Kolkata-700038. Even though the said loan had been brought into the stock of the partnership firm Akshara by the five land owning companies/ partners of the firm, LIC had insisted upon the said five companies also to separately create charge over their respective undivided shares in the land in favour of the firm.

11. The Applicant/Corporate Debtor states that the said loan was repaid in full and LIC Housing Finance Limited had also issued a ‘No Outstanding Certificate’on 14 October 2016.

12. The said Betwa Cottage Private Limited also obtained Inventory Finance Facility' from Tata Capital Housing Finance Limited (‘Tata Capital’) on 19 September 2016 to the tune of Rs.13,00,00,000/- (Rupees thirteen crores only) and on 27 August 2018 to the tune of Rs. 7,00,00,000/ - (Rupees seven crores only). Once again, the said 5 companies were made to give collateral security against the inventory finance loan availed. It is stated that the said loan has also been repaid in full and Tata Capital Housing Finance Limited has issued a ‘No Outstanding Certificate’ on 11 December 2019 and 26 December 2019 towards the loans of Rs.7,00,00,000/- (Rupees seven crores only) and Rs.13,00,00,000/- (Rupees thirteen crores only) respectively.

13. The relevant documents with respect to satisfaction of charge was filed by the 5 (five) companies with the Registrar of Companies, West Bengal, with respect to Betwa Cottage Private Limited but no documents for satisfaction of charge were filed onwards collateral security given by the said 5 companies. This

was an inadvertent error committed by the lending organization and as such, the said loans are incorrectly reflecting in the records of Registrar of Companies. The Corporate Debtor is taking appropriate steps to get the same rectified with the Registrar of Companies. In fact, the above inadvertent error came into the Applicant/ Corporate Debtor's notice in course of hearing on 14 February 2022.

14. As on 31 March 2021, there are loans aggregating toRs.3,90,96,845 / - (Rupees three crores ninety lakhs ninety six thousand eight hundred forty five only) in the accounts of the Applicant/Corporate Debtor. The Applicant/ Corporate Debtor has also provided certain short-term loans to its sister concern Betwa Landmark Private Limited. Such loan amounts to Rs.4,55,80,000/- (Rupees Four Crore fifty-five lakhs eighty thousand only).

Analysis & Finding

15. We have heard the Ld. Counsel appearing for the Financial Creditor and Ld. Sr. Counsel appearing for the Corporate Debtor and perused the records and the concerned documents annexed to the Petition. Upon perusal of the record it is apparent that the gamut of submissions by both the parties boil down to one issue i.e., did the default occur? If yes, then when?

16. From the perusal of the point 6, 7, 8& 9 at page 3 of the Reply, it is apparent that there is no dispute to the fact that the Corporate Debtor was in need of funds and had approached the Financial Creditor for financial support. Subsequently, the Financial Creditor invested in the Corporate Debtor in the form of ICD, between 29 November, 2016 to 08 March, 2017. However, be that as it may there is no agreement on record which would support the terms and conditions upon which that transaction took place between the parties.

17. With respect to the question of default, it is pertinent to mention that the Financial Creditor is relying on the letter dated 09 January, 2019, whereas, as per the contention of the Corporate Debtor, only letter sent by the Financial Creditor to the Corporate Debtor is letter dated 08 May, 2020.

18. The Corporate Debtor also contended that the letter dated 09 January, 2019 is forged by the Financial Creditor because as per the notification dated 23 September, 2020 by Ministry of Corporate Affairs no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified and if the letter dated 09 January, 2019 is taken into consideration then this instant application will not be barred by limitation. On the contrary, if the letter dated 08 May, 2020 is taken into account then the application is barred under section 10A of the Code.

19. It is also pertinent to mention that with respect to the letter dated 09 January, 2019, the Corporate Debtor filed a complaint before the Ld. CJM, Alipore and the complaint was admitted by the Ld. CJM vide its order dated 31

December, 2020, and directions were given to the Police Authority for submission of enquiry report. Subsequently, on 14 January, 2021 an enquiry report was submitted by the Police Authority and on the basis of which an FIR has been registered by the Officer-in-Charge of the Rabindra Sarobar Police Station.

20. Further, upon perusal of both the letters, we have also observed that the notice dated 08 May, 2020 by the Financial Creditor nowhere mentioned of their previous letter dated 09 January, 2019. It is also relevant to divulge that, albeit, the Balance Sheet as on 31 March, 2019 of the Corporate Debtor at page 36 of the Petition reflects the name of the Financial Creditor under the heading of Long-Term borrowings, but mere entry in the Balance Sheet cannot be construed as default; neither, the Independent Auditors report talks about any such default by the Corporate Debtor..

21. In light of the above facts and circumstances, we are of the view that for initiation of a CIRP under section 7 of the Code, one of the pivotal point is the establishment of default. However, in this instant application the authencity of the letter dated 09 January, 2019 as relied on by the Financial Creditor, which would be the cornerstone for initiation of CIRP against the Corporate Debtor, is itself under consideration before the Ld. CJM. It is also pertinent to mention that the proceeding before this Adjudicating Authority is summary proceeding, we cannot call on for the trial of the parties to substantiate their evidences relied on.

22. Therefore, from the facts placed on record, we are not convinced that there is a debt and default, which are that win ingredients to warrant initiation of CIRP proceedings in terms of section 7 of the Code, against the Corporate Debtor. Hence, the C.P. (IB)/1379/KB/2020 is dismissed.

23. We have also taken into account the facts stated by the Applicant i.e, the Corporate Debtor in I.A. (IB) No.284/KB/2022, with regard to an issue raised by this Adjudicating Authority to the list of charges appearing in the Applicant's/ Corporate Debtor's Master Data against the immovable property. The loan was repaid in full by the Corporate Debtor to LIC Housing Finance Limited and LIC Housing Finance Limited had also issued a 'No Outstanding Certificate' on 14 October 2016.

24. Further, the Corporate Debtor also repaid the loan in full to Tata Capital Housing Finance Limited and has issued Tata Capital Housing Finance Limited a 'No Outstanding Certificate' on 11 December 2019 and 26 December 2019 towards the loans of Rs.7,00,00,000/- (Rupees seven crores only) and Rs.13,00,00,000/-(Rupees thirteen crore only) respectively. The Corporate Debtor is taking appropriate steps to get the same rectified with the Registrar of Companies. In view of the above submissions by the Corporate Debtor, I.A. (IB) No.284/KB/2022 is disposed-of.

25. However, the Petitioner is at liberty to take any legal recourse before any other judicial forum available, if any.

26. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

27. File be consigned to record.

