IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI
PRINCIPAL BENCH

IB-1276/PB/2019

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

In the matter of:

MR. ASHOK KUMAR
Registered office at:
H.No.-25, Floor-1,
Pocket-2, Jasola,
Okhla, South Delhi,
Delhi-110025

Also at:

63, Block 18, Geeta Colony
New Delhi-110051

...Applicant

Versus

1. DWARIKA INFOCOM PVT. LTD.
Registered office at:
2, Park End, 3rd Floor,
Vikas Marg, New Delhi-110092

Corporate Office:

A-30, Sector -49,
Noida, Distt.- Gautam Budh Nagar,
Uttar Pradesh-201-301

2. **EDGE INFRASTRUCTURE PRIVATE LIMITED**
Registered office at:
C-102, Kalkaji,
New Delhi-110019

3. **GSR FARMS PRIVATE LIMITED**
Registered office at:
C-102, Kalkaji,
New Delhi-110019

4. **EDGE DWARIKA JV**
Registered office at:
2, Park End, 3RD Floor,
Vikas Marg, New Delhi-110092

Site/Branch Office:
Rajnagar Extension,
Noor Nagar- Sihani,
Tehsil & District Ghaziabad

...Respondents

Coram:

CHIEF JUSTICE (RTD.) M.M. KUMAR
HON'BLE PRESIDENT

DR. V.K. SUBBURAJ
HON'BLE MEMBER (TECHNICAL)

Counsel for Operational Creditor: Mr. Sandeep Mahapatra.

Counsel for Respondent: Mr. Sanjay Agnihotri

ORDER

Dr. V. K. Subburaj, Member

Date:09.08.2019

1. This is an application filed by Mr. Ashok Kumar seeking to initiate corporate insolvency resolution process ("CIRP") of the M/s Dwarika Infocom Pvt. Ltd. ("R1"), Edge Infrastructure Pvt. Ltd. ("R2"), GSR Farms Pvt. Ltd. ("R3") and Edge Dwarika JV("R4") ("Respondents") under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("the Code") for the alleged default on the part of the Respondents in repaying the loan amount of Rs. 5,19,52,493/- including the interest. The details of the transactions leading to the filing of this application as averred by the Applicant are as follows:

   i. The Applicant is one of the directors of the company, M/s Divyansh Pratham Infracon Pvt. Ltd. ("DPIPL") and M/s Divyansh Infracon Pvt. Ltd. ("DIPL") which are group companies and are renowned for its expertise in the business of construction and development of real estate projects and commands goodwill in the market. Apart from DPIPL, the Applicant is also one of the directors of DIPL.

   ii. A consortium agreement was entered between R1, R2 and R3 for the formation of R4 on 01.05.2012 and was registered on

11.05.2012. The shareholding pattern of R1, R2 and R3 R4 being 25.00%, 37.50% & 37.50%, respectively.

iii. R1 on behalf of the joint venture consortium portrayed to the Applicant that they have exclusive rights of development and sale of approx. 39371.25 sq. mtr. of land at Khasra No.1085, 1086, 1088, 1089 & 1135M at village Noornagar, Ghaziabad ("the land").

iv. In March, 2010, the Respondents approached the Applicant in order to avail their assistance in developing a project at Ghaziabad, Uttar Pradesh.

v. Through a proposed MoU with DIPL, R1 on the strength of the consortium MoU, on behalf of the Respondents, proposed to give returns in the form of 50% of the share of 63% of the total developed and constructed area on the land to the Applicant and/or DIPL, including profits and benefits therein, in lieu of the latter's investment and assistance in development and construction of the project. Under the proposed MoU, the Applicant and/or DIPL was requested by the Respondents to make an initial payment of INR 9,00,00,000/- to R1, for the project, which all the Respondents are a part of.

vi. Before the MoU was finalized and at the stage of mutual deliberations/negotiations R1 requested DPIPL and/or DIPL to

pay a part of the aforesaid requested amount for the project as an urgent requirement. Accordingly, based upon the representations as portrayed by the Respondents DPIPL paid INR 2,50,00,000/- on 15.04.2014 and 11.06.2014 into the project of the Respondents, which was transferred to the account of R1 as per its request. However, it was requested that some payments be made from the personal account of the directors of the Applicant.

vii. Thereafter, an amount of INR 1,50,00,000/- (Indian rupees one crore fifty lacs only) was returned by R1 on 14.11.2014 to the Applicant and simultaneously payments as requested were made through the personal accounts of the directors of DPIPL i.e. the Applicant and another director to R1. As a result, amount to the tune of INR 2,25,00,000/- (Indian rupees two crore twenty-five lac only) has been paid by the Applicant to R1.

viii. Sometime in March-April, 2016, to the utter surprise of the Applicant the Respondents informed the Applicant, contrary to initial representations and assurances of their financial strength and capacity, that due to paucity of funds for initiation of construction and stamp duty for registration of the consortium MoU, the Respondents had decided to discontinue with the

original project, i.e. constructing multi-storey group housing development and instead, they would like to modify it to development of plots. Shortly thereafter, on 16.06.2016, an email was sent by R1 regarding the sub-divisional plan of 140 plots to the Applicant. Again on 23.08.2016, R1 shared the layout plan of the plots with the Applicant.

ix. The Applicant met R1 and made his intentions very clear that with the original plan being unilaterally changed, the Applicant was no longer interested in making any investments in the project or collaborating with the Respondents. The Applicant asked the Respondents to immediately return the amount paid to R1 with commercial interest of at least 24 % per annum. However, the Respondents requested the Applicant for more time to repay the sum received from the Applicant on the frivolous pretext that alleged losses had been suffered by the Respondents.

x. R1 has been treating the payments made by the Applicant as long terms borrowing reflected as "unsecured loans" in its balance sheets, which is admittedly due to the Applicant by the Respondents and is liable to be repaid with commercial interest of at least 24 % p.a.

xi. In fact, on 26.11.2018, R1 sent a confirmation of account to the Applicant, for the period 01.04.2015-31.03.2016, depicting the payment received of INR 2,25,00,000/- (Indian rupees two crore twenty-five lacs only) as standing in the books of accounts of R1.

xii. The receipt of payments for the project by the Respondents from the Applicant for promised substantial returns, tantamount to commercial borrowing/financial debt. The payments received from the Applicant has been admittedly treated as loan in the books of accounts of R1 which is admittedly outstanding and which the Respondents are liable to repay with interest @ 24% p.a.

xiii. On 28.02.2019, a legal notice was sent to the Respondents, and their respective directors, by the Applicant, calling upon them to repay the due amount of INR 2,25,00,000/- (Indian rupees two crore twenty-five lacs only) along with interest at the rate of 24% p.a. from 14.11.2014 till the date of realization of the unpaid financial debt, within fifteen (15) days of receipt of the notice.

xiv. On 25.03.2019, R1 sent a reply to the legal notice dt. 28.02.2019 by the Applicant, wherein, they have categorically acknowledged and admitted the receipt of INR 2,25,00,000/-

(Indian rupees two crore twenty-five lacs only) from the Applicant in the circumstances as detailed in the said legal notice. However, in the said reply, R1 has falsely and evasively, sought to avoid the payment of admitted financial debt. The other Respondents have also in their reply dt. 15.04.2019, made mere evasive denials, tantamount to admission of the financial debt, with no specific averments being made in response to the legal notice dt. 28.02.2019 by the Applicant.

2. R1 has filed the following reply:

   i. As per the MoU dated 29.03.2014 DIPL had to make payment of a sum of Rs. 9,00,00,000/- to R1 as "Entering Cost" which was to be an up-front, non-refundable and non-adjustable amount. The payment of the Entering Cost of Rs. 9,00,00,000/- was to be made by 01.08.2014. It was agreed that payment of the "Entering Cost" of Rs. 9,00,00,000/- was to be a pre-condition for the entry of DIPL into the project for providing 50% share in the expenses; a development and construction of land in consideration for 50% share in the developer share of the project i.e. 50% of the 63% of the fully constructed area on the land. The payment of the "Entering Cost" was agreed to be

up-front, non-refundable and non-adjustable. It was also agreed that in the event DIPL failed to make payment of the entire sum of Entering Cost of Rs. 9,00,00,000/- then DIPL would not get entry into the project, would not participate in the project in any manner, would not receive any share in the project, and, further, that any amount paid towards the Entering Cost would not be refunded or adjusted in any manner.

ii. DIPL could not make payment of the complete Entering Cost of Rs. 9,00,00,000/- by 01.08.2014. Thereafter, DIPL represented to R1 that it was arranging funds and to give time till October 2014 for making payment of the complete Entering Cost of Rs. 9,00,00,000/-. R1 believing bona fide in the representations of DIPL permitted DIPL to make payment of the complete "Entering Cost" of Rs. 9,00,00,000/- by 31st October, 2014. However, even thereafter DIPL failed to make payment of the complete Entering Cost. As on October 2014, DIPL had made payment of only an amount of Rs. 5,50,00,000/- towards the "Entering Cost" which was short of the complete Entering Cost by Rs. 3,50,00,000/-. DIPL continued to make representations till October 2015 that it would make payment of the complete Entering Cost of Rs.

9,00,00,000/-, however, the complete payment was never made.

iii. Contrary to the representation made by DIPL and its directors as well as DPIPL, DIPL failed to make payment of the Entering Cost of Rs.9,00,00,000/- and never made an entry into the project and never provided any money for the project. This gravely jeopardized the heavy investment made by R1 in the project and R1 has borne heavy losses on this account. DIPL, DPIPL as well as its directors i.e. the Applicant and Sh. C. B. Singh are jointly as well as severally liable to pay damages and compensation to R1 for the losses suffered by R1 on account of the false representations. The losses suffered on this account have been tentatively quantified as Rs. 7,00,00,000/- (rupees seven crore) and R1 is in the process of further quantifying the full figure of loss which is more than this tentative figure.

iv. It is pertinent to mention that if the payment were made as a loan then surely the Applicant must have raised demand for repayment of at least the interest if not principal plus interest. It is surprising that the Applicant has failed to account for 3 years from 2016 to 2019 in its application wherein it never raised any demand for repayment of its alleged loan with interest of at least 24% p.a.

v. In so far as the balance sheet of R1 is concerned, the reflection as "unsecured loan" is only because of accounting practice, and the same does not mean that payment made was actually a loan or borrowing. Further, the Applicant itself had written to the tax authorities stating that the payments made to R1 was not a loan. The loans taken are shown as 'NIL' under "Term Loans" in the Balance Sheet filed by the Applicant in the Income Tax Return. It can also be seen under point 2.30 "Contingent Liability" of the balance sheet says that "There is no claim against the company, which is to be acknowledged as debt." It is clear from the above discussions that the mere fact that the Entry Fee has been placed under the long-term borrowings does not accrue any right of refund or interest to the Applicant. There was no agreement for any financial loan or borrowing or any interest and there is no financial debt.

3. The Applicant filed his rejoinder to the reply filed by R1 in which it has contended the same points as highlighted in the application.

4. Respondents No.2 and 3 filed applications seeking to deletion as parties as there is no privity of contract between them and the Applicant. However, they filed their replies on 03.07.2019 and

09.07.2019 respectively in which they contend that no document exists nor is relied upon and/or pleaded by the Applicant in any manner showing any privity and/or relation amongst the Applicant and Respondents no. 2 and 3. They have contended that no alleged representation ever took place between the Respondents 2 and 3 and the Applicant, no monetary transaction took place between them and there does not exist a single document by which they could establish any privity between Respondents 2 and 3 and the Applicant.

5. We have gone into the details of the documents filed by the Applicant and the Respondents. We also heard the detailed arguments advanced by both the sides. It is clarified at the outset that the MoUs proposed between the Applicant and R1, attached with the application, are only draft documents which cannot serve any purpose and cannot be pressed to support the contentions of either side. It is also held that the explanation given by the R2 and R3 is persuasive because there is no privity between the Applicant and R2, R3 and even R4. The money was paid to R1 only money. R2, R3 and R4 cannot be pleaded as corporate debtors to this application.

6. The basic issue to be decided in this case is whether the amount paid by the Applicant comes under the definition of 'Financial Debt' as

defined in the Code. As contended by R1 in its reply, any money to be treated as financial debt should have two components viz, (i) interest and (ii) consideration for time value of money. Clearly in this case the Applicant has failed to prove any interest or consideration against time value of money. There is no document or agreement which shows the terms on which the money was given by the Applicant to R1 and specifically that any interest was payable on the money. We are unable to persuade ourselves that the advance paid by the Applicant to R1 has commercial effect of borrowing. Even in the application it is stated, "petitioner asked the respondents to immediately return the amount paid to the respondent no.1 with commercial interest of at least 24% per annum". It clearly indicates that the interest rate was not fixed. The Applicant has also failed to mention the repayment schedule and the time when the debt became due.

7. In view of the above fundamental flaws in the arguments advanced by the Applicant we find that the application is devoid of merit and does not warrant admission. Accordingly, the same is dismissed.

8. We wish to clarify that any observation made in this order shall not be construed as an expression of opinion on merit. The Applicant

shall be at liberty to avail any other remedy in accordance with law and dismissal of the present application would not create a bar for any other remedy available in law.

Sd/-

(M.M. KUMAR)
PRESIDENT

Sd/-

(DR. V.K. SUBBURAJ)
MEMBER (TECHNICAL)

Deepak