

**IN THE NATIONAL COMPANY LAW TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

(IB)/1050(PB)/2020

Under Section 7 r/w Rule 4 of the IBC, 2016

In the matter of

M/s. UKG Steel Private Limited

.... Applicant/Financial Creditor

Vs.

M/s. Erotic Buildcon Private Limited

.... Respondent/Corporate Debtor

Order Pronounced on: 31.05.2021

CORAM:

SHRI B.S.V PRAKASH KUMAR

HON'BLE ACTG. PRESIDENT

SHRI HEMANT KUMAR SARANGI

HON'BLE MEMBER (TECHNICAL)

For the Financial Creditor: Mr. Avdhesh Bairwa, Advocate.

For the Corporate Debtor : Mr. Nityanand Singh, Advocate.

ORDER

1. The petitioner company UKG Steel Private Limited (“hereinafter referred as Financial Creditor”) was incorporated under the erstwhile Companies Act, 1956 on 11.06.1998 and had filed this petition as a “Financial

Creditor” against M/s Erotic Buildcon Private Limited (“hereinafter referred as Corporate Debtor”) in terms of Section 7 of the Insolvency and Bankruptcy Code, 2016 (the Code) by filing application in Form 1 as prescribed in Rule 4(1) of the Insolvency and Bankruptcy Rules, 2016 (the Rules).

2. That the Corporate Debtor was incorporated on 15.12.2006, under the erstwhile Companies Act, 1956 with CIN No. U45200DL2006PTC156631. That the registered office is located in Pitampura, New Delhi. Therefore, the same falls within the territorial jurisdiction of this Bench. That the authorised share capital of the corporate debtor is Rs. 1 Crore and the paid-up share capital is Rs. 16 Lakhs.
3. The Facts of the case briefly stated are that, on perusal of the Company Petition are, that a loan agreement was executed between the parties on 16.03.2019 and pursuant to that the financial creditor had advanced the loan of Rs. 3,76,45,000/- at interest rate of 6.5% per. The respondent had assured and agreed to make the repayment, would be in 8 quarterly instalments starting from 30th June 2019, and operative upto 31st March 2021 i.e till the validity of the Loan Agreement. Further, subject to the renewal with the mutual consent of the parties.
4. It is submitted by the Financial Creditor, the amount of Rs. 3.76 Crores was disbursed by the Financial Creditor on different dates, in the five consecutive instalments i.e (i) Rs. 46,80,000/- on 16.03.2019. Another (ii) Rs 60 lacs on

18.03.2019, (iii) Rs.1.5 crores on 18.03.2019, (iv) Rs.1 crore on 19.03.2019 and lastly (v) Rs. 64,65,000/- on 19.03.2019. The Bank statement of the Karnataka Bank Limited has been placed on record as (Annexure-I Exhibit D, @ page 60 to 65), by the Petitioner in this context, which is clearly smudged and not a single transaction of the aforementioned dates are visible.

5. It is further stated that the petitioner sent several requests and, repeated reminders to the respondent, to repay the loan amount as per the terms of the agreement. The respondent had defaulted in repayment of the principal amount and did not make any repayment of the interest and principal amount.
6. Therefore, the petitioner had sent notice dated 10.07.2019 to the respondent-corporate debtor raising demand of the outstanding amount with interest, the respondent had replied to the notice and expressed its inability to make the due payment, by stating his liquidity concern in the company. Another demand letter dated 07.10.2019 send to the respondent. Thereafter, petitioner had decided to recall the total loan amount including the interest amounting to Rs. 3,91,91,522 vide its letter dated 02.01.2020 stating to take legal action against the respondent, to which the respondent did not reply.
7. Consequently, the petitioner had sent a last notice dated 25.06.2020 and requested the respondent to make the

immediate payment of the debt amount. However, the due amount has not been paid so far. Hence, this petition.

8. The corporate debtor vide its Reply filed on 03.12.2020 stated about their financial crisis, which occurred to their company, due to which they could not pay the loan instalment timely. Further, had stated that, they have bonafide intention to repay the entire amount and sought some more time to normalise their business operations, after improvement in the prevailing covid situation.
9. The submissions heard from both the sides. Perused the contents of the petition as well as the reply of the Respondent in the light of the annexed evidence. From perusal of the Bank Statement and Passbook it is observed that ex-facie there is no evidence which reflects that the money was transferred from the Petitioner-financial creditor to the respondent-corporate debtor. The Bank statement annexed by the petitioner have a smudged visibility which gives the negligent impression about the Petitioner, in furtherance of this the Balance sheet nowhere shows the disbursement of the principal amount from the petitioner's account.
10. That the Corporate Debtor in its reply has not denied the disbursement of loan, on the basis of that if we still presume that the loan was still disbursed, then the question which still remains before us is whether the Financial Creditor, who is neither a Bank/NBFC nor a body corporate

recognised by RBI for carrying out financial business, was authorised to give such loan amount or not.

11. At this juncture we would like to refer Section 186 of Companies Act 2013, which deals with the Inter-Corporate Loans and sets out a limit on a company for disbursing loan to the other entities. The content of Section 186 of Companies Act 2013 is reproduced below-

186. Loan and investment by company

(1) Without prejudice to the provisions contained in this Act, a company shall unless otherwise prescribed, make investment through not more than two layers of investment companies:

Provided that the provisions of this sub-section shall not affect, —

(i) a company from acquiring any other company incorporated in a country outside India if such other company has investment subsidiaries beyond two layers as per the laws of such country.

(ii) a subsidiary company from having any investment subsidiary for the purposes of meeting the requirements under any law or under any rule or regulation framed under any law for the time being in force.

(2) No company shall directly or indirectly —

(a) give any loan to any person or other body corporate.

(b) give any guarantee or provide security in connection with a loan to any other body corporate or person; and

(c) acquire by way of subscription, purchase or otherwise, the securities of any other body corporate, exceeding sixty per cent. of its paid-up share capital, free reserves and securities premium account or one hundred per cent. of its free reserves and securities premium account, whichever is more.

(3) Where the giving of any loan or guarantee or providing any security or the acquisition under sub-section (2) exceeds the limits specified in that sub-section, prior approval by means of a special resolution passed at a general meeting shall be necessary.

(4) The company shall disclose to the members in the financial statement the full particulars of the loans given, investment made, or guarantee given or security provided and the purpose for which the loan or guarantee or security is proposed to be utilised by the recipient of the loan or guarantee or security.

(5) No investment shall be made or loan or guarantee or security given by the company unless the resolution sanctioning it is passed at a meeting of the Board with the consent of all the directors present at the meeting and the

prior approval of the public financial institution concerned where any term loan is subsisting, is obtained:

Provided that prior approval of a public financial institution shall not be required where the aggregate of the loans and investments so far made, the amount for which guarantee or security so far provided to or in all other bodies corporate, along with the investments, loans, guarantee or security proposed to be made or given does not exceed the limit as specified in sub-section (2), and there is no default in repayment of loan instalments or payment of interest thereon as per the terms and conditions of such loan to the public financial institution.

(6) No company, which is registered under section 12 of the Securities and Exchange Board of India Act, 1992 and covered under such class or classes of companies as may be prescribed, shall take inter-corporate loan or deposits exceeding the prescribed limit and such company shall furnish in its financial statement the details of the loan or deposits.

(7) No loan shall be given under this section at a rate of interest lower than the prevailing yield of one year, three-year, five year or ten-year Government Security closest to the tenor of the loan.

(8) No company which is in default in the repayment of any deposits accepted before or after the commencement of this Act or in payment of interest thereon, shall give any loan or give any guarantee or provide any security or make an acquisition till such default is subsisting.

(9) Every company giving loan or giving a guarantee or providing security or making an acquisition under this section shall keep a register which shall contain such particulars and shall be maintained in such manner as may be prescribed.

(10) The register referred to in sub-section (9) shall be kept at the registered office of the company and —

(a) shall be open to inspection at such office; and

(b) extracts may be taken therefrom by any member, and copies thereof may be furnished to any member of the company on payment of such fees as may be prescribed.

(11) Nothing contained in this section, except sub-section (1), shall apply—

(a) to a loan made, guarantee given, or security provided by a banking company or an insurance company or a housing finance company in the ordinary course of its business or a company engaged in the business of financing of companies or of providing infrastructural facilities;

(b) to any acquisition—

(i) made by a non-banking financial company registered under Chapter IIIB of the Reserve Bank of India Act, 1934 and whose principal business is acquisition of securities:

Provided that exemption to non-banking financial company shall be in respect of its investment and lending activities;

(ii) made by a company whose principal business is the acquisition of securities;

(iii) of shares allotted in pursuance of clause (a) of sub-section (1) of section 62.

(12) The Central Government may make rules for the purposes of this section.

(13) If a company contravenes the provisions of this section, the company shall be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to two years and with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees.

Explanation. —For the purposes of this section, —

(a) the expression “investment company” means a company whose principal business is the acquisition of shares, debentures, or other securities.

(b) the expression “infrastructure facilities” means the facilities specified in Schedule VI.

12. To calculate whether the Petitioner-financial creditor has given loan in terms of Section 186 of Companies Act 2013 we refer to Page 50 of the Petition, wherein the Balance Sheet of the Financial Creditor has annexed which depicts that the Paid-Up Share Capital of the Petitioner-financial creditor company is of Rs. 97,75,020 and Reserves and Surplus are of Rs 66,58,072. The information of Security Premium Account has not been separately provided in the Balance Sheet. That the aggregate of Paid-Up Share Capital and Reserves and Surplus amounts to Rs. 1,64,33,092 and 60% of that amount is Rs 98,59,855.2. If we compare both the amounts, then we observe that the loan amount disbursed by the Financial Creditor is more than 3 Crore which is much more than 60% of aggregate of Paid-up Share Capital and Reserve and Surplus.

13. That the Petitioner has neither made the disclosure of such Inter Corporate Loan in its Balance Sheet nor it had produced the Special Resolution passed in the EGM of Shareholders for the purpose of compliance of Section 186(3) of Companies Act 2013. Further, the Loan Agreement does not speak about any such resolution passed by the shareholders.

14. Therefore, the material available on the record suggest that the borrowing given by the Petitioner is contrary to the limit prescribed under Companies Act 2013 which amounts to an ultra vires act committed by the Petitioner. Hence the loan advanced by the Petitioner is not a legally enforceable debt.

Therefore, the bench finds no merit in the petition and the same is hereby dismissed as misconceived.

Sd/-

**(BSV PRAKASH KUMAR)
ACTNG PRESIDENT**

Sd/-

**(HEMANT KUMAR SARANGI)
MEMBER (TECHNICAL)**