

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH (Court– I)
KOLKATA**

C.P. (IB) 309/KB/2022

A petition under section 7 of the Insolvency and Bankruptcy Code, 2016, read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

In the matter of:

Eastern Housing Udyog Finance Limited [CIN: U65999WB1992PLC056095], a company within the meaning of Companies Act, 2013 and having its registered office at the 4A, Council House Street, Kolkata - 700001.

..... *Financial Creditor/ Petitioner*

-versus-

Arcuttipore Tea Company Limited[CIN: L15491WB1900PLC000220], being a company within the meaning of Companies Act, 2013 and having its Registered Office at MMS Chambers, 4A Council House Street, Kolkata- 700001

..... *Corporate Debtor/ Respondent*

Date of Pronouncement of the order: 15 December 2023

Coram:

Mr. Rohit Kapoor, Member (Judicial)

Mr. Balraj Joshi, Member (Technical)

Appearances (via video conferencing/physical):

For the Financial Creditor:

Ms. Manju Bhuteria, Adv.

Ms. Tanvi Luhariwala, Adv.

Mr. Kailash Dhanuka, Adv.

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For the Corporate Debtor:

Mr. Rahul Auddy, Adv.

Mr. Aditya Gooptu, Adv.

ORDER

Balraj Joshi, Member (Technical):

1. This Court convened through hybrid mode.
2. This is a Company Petition under section 7 of the Insolvency and Bankruptcy Code, 2016 (herein after referred as “the Code” or “IBC”) by **Eastern Housing Udyog Finance Limited**, hereinafter referred to as “*Financial Creditor*” seeking to initiate Corporate Insolvency Resolution Process (“CIRP”) against **Arcuttipore Tea Company Limited**, hereinafter referred to as “*Corporate Debtor*”.
3. The Corporate Debtor is a private limited company incorporated on 19.01.1900. The authorized share-capital of the company ₹7,00,00,000/- and the paid-up share capital of the company is ₹5,380,83,648/-.
4. The total amount claimed to be in due to the Financial Creditor, is ₹4,70,37,016/- /-. The date of default is mentioned as 10.07.2022.
5. The Financial Creditor has relied on the various documents in support of its claims, including:
 - a) Loan Agreement dated 28.06.2019, annexed as Exhibit “**F**”;
 - b) Hypothecation Agreement dated 28.06.2019, annexed as Exhibit “**G**”;
 - c) Letter dated 22.06.2020, annexed as Exhibit “**I**”;
 - d) Audited Financial Statement along with Ledger Account of the Corporate Debtor;
 - e) Cheque dishonoured Memos, annexed as Annexure “**O (Colly)**”;

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6. Submissions on behalf of the Financial Creditor:

6.1 The case of the Financial Creditor is that since 2014, Arcuttipore Tea Company Limited *i.e* Corporate Debtor availed loans from the Financial Creditor, which is a non- banking finance company. The said loans were repayable with interest at 18% p.a as required by it from time to time. In June, 2019, the Corporate Debtor agreed to hypothecate its movable assets in order to secure the outstanding amounts as well as any further funds which it might borrow subject to a maximum limit of Rs. 2,50,00,000/-. Pursuant to negotiations, on 28th June, 2019, the parties entered into a loan agreement¹ whereby the Financial Creditor agreed to provide the Corporate Debtor a credit facility of Rs. 2,50,00,000/- for meeting its various working capital needs.

6.2 In terms of the loan agreement a deed of hypothecation² was also executed by and between the parties on 28 June, 2019 whereby the Corporate Debtor hypothecated in favour of the Financial Creditor its entire stock of raw materials, semi-finished and finished goods consumable stores and spares and such other movables including book-debts, bills, outstanding monies, receivables, both present and future, and whole of the movable properties including plant and machinery, machinery spares, tools, vehicles, furniture and fixtures and accessories and other movables both present and future.

6.3 The Corporate Debtor has availed the aggregate sum of Rs.2,49,99,330/- as Loan in terms of the loan Agreement dated 28th June, 2019. The charge as created by the Corporate Debtor in favour of the Financial Creditor towards securing the credit facility of Rs. 2,50,00,000/- was duly registered³ with the Registrar of Companies (in short "ROC").

6.4 The Corporate Debtor continuously defaulted in paying the monthly interest on and from June, 2019 which was payable by the 10th of each month as per

¹Annexure "F"

²Annexure "G"

³Annexure "H"

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Clause 4 of the Loan Agreement and became liable to pay interest @ 18% as agreed by and between the parties.

- 6.5 In view of the above default on the Part of the Corporate Debtor, the Financial Creditor on 22nd June, 2020 called⁴ upon the Corporate Debtor to provide the Financial Creditor its list of insurance policies with last paid premium receipt and details of its liabilities including other loans to enable the Financial Creditor to ascertain whether the assets of the Corporate Debtor were sufficient to secure the amount advanced in terms of the aforesaid agreements.
- 6.6 Despite due receipt of the said letter dated June 22, 2020, the Corporate Debtor failed to give any reply in writing and continue to default in paying interest and other terms and condition of the Loan Agreement.
- 6.7 The accrued interest on the outstanding sum of Rs.2,49,99,330/- at the rate of 18% per annum from 01.04.2014 to 31.10.2021 is Rs. 1,61,39,023/- as the same would be evident from the ledger⁵ account of the Corporate Debtor in the books of the Financial Creditor.
- 6.8 Accordingly, C.P. (IB) 361 (KB)/2021, an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 was filed on 24.11.2021 before this Adjudicating Authority, which is filed within the period of limitation as the date of default is Jun 2019.
- 6.9 While C.P. (IB) 361 (KB)/2021 was pending adjudication, the term of settlement was executed between the Financial Creditor and Corporate Debtor on 13.04.2022 and couple of cheques of Rs. 5,00,000/- and 10,00,000/- were handed over by the Corporate Debtor as signing amount.

⁴Annexure "I"

⁵Annexure "J"

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- 6.10 On 25.04.2022, in IA (I.B.C.) 368 (KB) 2022⁶, this Adjudicating Authority passed an order taking into record the Terms of settlement and C.P. (IB) 361 (KB)/2021 was disposed of as withdrawn.
- 6.11 On 26.04.2022, the Financial Creditor received a letter⁷ from Corporate Debtor seeking extension of one month explaining that the business associate of Corporate Debtor needs one month time to release the funds and requested the Corporate Debtor to deposit the said cheques within 3rd week of May, 2022 for which advance intimation will be given to Financial Creditor. On reply to the request of the Corporate Debtor, acknowledgment letter was sent by the Financial Creditor by agreeing to the proposal for extension of time of one month as requested in the letter.
- 6.12 The Financial Creditor received another letter⁸ dated 17.05.2022 from the Corporate Debtor requesting again that due to flood in Silchar, Assam where the Tea Garden of Corporate Debtor is located, has affected the business and showed inability to make payment of the loan amount of Rs. 15,00,000/- (Two cheques of 5,00,000 and 10,00,000) and the installments of the balance settled will be delayed. In the reply of the letter, the Financial Creditor considered the reason of flood in Silchar, Assam and decided to extend the support by granting further extension of time for depositing the cheques. Financial Creditor also stated that cheques received by Corporate Debtor will get stale on expiry of 90 days from the date of the said cheques i.e., 13.04.2022, that the fund must be arranged before the cheques gets stale or else the Financial Creditor will be compelled to deposit the cheques before the due date.
- 6.13 On 01.07.2022, once again a letter⁹ received from the Corporate Debtor informing about the flood situation in the month of June, 2022 and the same

⁶Annexure "K"

⁷Annexure "L"

⁸Annexure "M"

⁹Annexure "N"

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mentioned that although the business condition was yet to improve, the Corporate Debtor have arranged for the sum of Rs. 5,00,000 and for the balance amount of Rs. 10,00,000, a period of further 10 days time was requested.

6.14 On 01.07.2022, cheque of Rs. 5,00,000/- was deposited and subsequently dishonored on 02.07.2022. However on 05.07.2022, once again the cheque of Rs.5,00,000/- deposited and was cleared. Further Cheque of Rs.10,00,000/- was deposited but was dishonored¹⁰. No further communication was received from the Corporate Debtor.

6.15 The Corporate Debtor has failed to pay the principal amount Rs.2,49,99,330/- and accrued interest from 01.04.2014 to 31.08.2022 is Rs.2,20,37,686/-. The Corporate Debtor has failed to oblige its dues for an aggregate amount of Rs.4,70,37,016/-which is payable to the Financial Creditor.

7 Submissions on behalf of the Corporate Debtor:

7.1 The Corporate Debtor has admitted that it took loans from the Financial Creditor herein and even undertook to repay a sum of Rs. 2,49,99,330/- vide the settlement deed dated 13.04.2022 whereby post dated cheques were given by the Corporate Debtor. Some of the cheques were dishonored due to financial crunch being faced by the Corporate Debtor.

7.2 The primary funds for the corporate debtor's revenue come from crops in the tea garden and since 2020 there has been a drastic drop in crop of green leaves. A comparative chart ¹¹of crop yield for years 2020 and 2021 and 2022 is annexed to the Reply- Affidavit. Moreover, after the settlement, there were problems with the flood also. Thus, the wages payable had also increased during the pandemic and there are dues on this account. The corporate debtor had also suffered setback in court decisions under Section 138 and recovery proceedings and as a result thereof the functioning of the corporate debtor has suffered. The

¹⁰Annexure "O"

¹¹Annexure "A" to Reply

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Corporate Debtor has not been able to pay its statutory dues which have accrued in excess of Rs. 3-4 crores. Because of the adverse business condition, the Corporate Debtor has also failed to make payment of salary, wages and other labour payments, including P.F. dues, Cess, GST etc. in full. Otherwise, the corporate debtor would have been able to pay off the debts of the Petitioner that were due for which it has created security by way of charge.

8 Analysis and Findings:

8.1 Heard the Ld. Counsel on behalf of the Financial Creditor and the Ld. Counsel on behalf of the Corporate Debtor and perused the records.

8.2 This Adjudicating Authority, vide order dated 25.04.2022 noted that in I.A. 368/KB/2022 in CP(IB) 361/KB/2021, settlement between the parties herein was recorded and accordingly, CP(IB) 361/KB/2021 was dismissed as withdrawn.

8.3 Regarding the maintainability of the instant petition after the withdrawal of the previous petition, the Ld. Counsel on behalf of the Financial Creditor has relied on the decision taken by the Hon'ble National Company Law Appellate Tribunal (NCLAT) in the matter of ***Priyal Kantilal Patel vs. IREP Credit Capital Pvt. Ltd. &Anr.***¹²

“11. When we look into the Part-IV of Section 7 Application, in the Application the Financial Debt as was originally claimed in the earlier application has been claimed. The Application is not founded only on the default of the consent terms rather application is founded on the original financial debt which was extended by the financial creditor to the corporate debtor.

12. The judgement which has been relied by Learned Counsel for the Appellant “Amrit Kumar Agrawal” (supra) was a case where section 7 application was filed on the ground of default in payment of settlement

¹²Company Appeal (AT) (Insolvency) No. 1423 of 2022 & I.A. No. 4457 of 2022

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agreement where the court held that default in payment of settlement agreement does not constitute a financial debt. The facts of the present case are clearly distinguishable. Present is not a case where Section 7 Application has been filed only on the ground of default in the settlement agreement rather section 7 application has been filed on the basis of original financial debt which was extended by the Financial Creditor to the Corporate Debtor. The mere fact that in earlier company petition, consent terms was arrived, which consent terms was breached by the corporate debtor, the financial debt which was claimed by the financial creditor would not be wiped out nor the nature and character of financial debt shall be changed on account of breach of the consent terms. Permitting such interpretation shall be giving premium to the corporate debtor who breach the consent terms. Another judgement which has been relied on by Learned Counsel for the Appellant is “Dr.Gopal Krishnan MS”, (supra) which is also judgement relying on “Amrit KumarAgrawal”. The court in the facts of the said case came to the conclusion that debt is not a financial debt. The above judgement is also clearly distinguishable.”

8.4 In light of the aforementioned decision, it is clear to us that simply because the earlier petition was withdrawn on account of settlement of debt, the same will not act as a bar to the institution of the instant petition filed in respect of the original debt and the default thereon as the right of the creditor had been exercised at the appropriate material time.

8.5 Coming to the merits of the instant petition, it is seen that the Corporate Debtor has admitted to having taken loans from the Financial Creditor in paragraph 4 of its Reply Affidavit. The Corporate Debtor has further admitted that it undertook to repay a sum of Rs. 2,49,99,330/- vide settlement deed dated 13.04.2022 but was unable to do so owing to financial crunch and other reasons.

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8.6 Further, upon perusal of record, it is clear to us that a loan for the amount of Rs.2,49,99,330/- was sanctioned to the Corporate Debtor *vide* loan agreement dated 28.06.2019. We have also perused through I.A.(I.B.C.) 361/KB/2021 along with the settlement agreement dated 13.04.2022 wherein under clause 4¹³, it is clearly mentioned that in case of non-payment of the agreed amount on the agreed date, including dishonour of cheque, the Financial Creditor can revoke the settlement agreement and restore the original liabilities of the Corporate Debtor herein. It is further mentioned in said clause 4 that the Financial Creditor shall be free to take legal action under the IBC. It is clear to us from Annexure O (COLLY)¹⁴ that the cheques issued by the Corporate Debtor were dishonoured upon presentment.

8.7 Additionally, the communication exchanged between the parties i.e letters dated 26.04.2022, 17.05.2022 and 01.07.2022 all indicate towards the inability of the Corporate Debtor in repaying its debt.

8.8 It is to be noted that the loan was disbursed on 28.06.2019 and the Financial Creditor first demanded payment *vide* letter dated 10.09.2020, as has been mentioned in the settlement agreement¹⁵. Subsequently, upon failure of the Corporate Debtor to repay the loan, CP(IB) 361/KB/2020 was filed on 20.11.2021. After settlement was reached between the parties on 13.04.2022, CP(IB)361/KB/2020 was withdrawn. Thereafter, the cheques issued by the Corporate Debtor were dishonoured upon presentment. In part IV of the instant petition, the Financial Creditor has mentioned that the cheque dated 001474 for an amount of Rs. 10,00,000/- was deposited on 10.07.2022 and the same was dishonoured. As such, 10.07.2022 has been taken as the date of default. It is to be noted that upon perusal of Annexure O (COLLY), it can be seen that the said

¹³Page 120 of the petition

¹⁴Page 129-132 of the Petition

¹⁵Page 118 of the petition

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cheque no. 001474 was presented on 08.07.2022 and the same was returned on 11.07.2022. It is unclear whether the said cheque was dishonoured on 10.07.2022.

- 8.9 Be that as it may, since the limitation period for filing an application under section 7 of the Code is 3 years from the date of default and the instant petition was filed on 29.09.2022, we hold that irrespective of the perceived date of default, the petition is within limitation. Further, it is also noted that the date of default in the earlier petition was 10.09.2020 and even if the same is taken into account, the instant petition has still been filed within three (3) years from the said date and as such, the instant petition is beyond doubt, within limitation period.
- 8.10 Lastly, the amount claimed to be due is Rs. 4,70,37,016/- including a principal amount of Rs. 2,49,99,330/- and interest amounting to Rs. 2,20,37,686/- as on 31.08.2022. The amount claimed is above the the default of the Corporate Debtor is more than the minimum amount stipulated under section 4(1) of the Code. Also, the the name of the Interim Resolution Professional has been proposed in Part III of the Code. As such the instant petition is complete in all respects.
- 8.11 Therefore, keeping in view the aforesaid facts, circumstances and the judgment cited above, we are of the view that the Corporate Debtor has defaulted in repayment of its debt owed to the Financial Creditor and as such, it must be admitted into CIRP.
- 8.12 It is, accordingly, hereby ordered as follows:-
- i. The application bearing **CP (IB) No. 309/KB/2022** filed by **Eastern Housing Udyog Finance Co. Ltd.**(*Financial Creditor*), under section 7 of the Code read with rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against **Arcuttipore Tea Co. Ltd.** (CIN: L15491WB1900PLC000220), the Corporate Debtor, is *admitted*.
 - ii. There shall be a moratorium under section 14 of the IBC.

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- iii. The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.
- iv. Public announcement of the CIRP shall be made immediately as specified under section 13 of the Code read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- v. **Mr. Pranab Kumar Chakrabarty**, having registration number **IBBI/IPA-003/IP-N00088/2017-18/10826**, email: **pranabchakrabartypkc@yahoo.com** is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the Code subject to submission of a valid Authorisation of Assignment in terms of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016.
- vi. The fee payable to IRP or the RP, as the case may be, shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the Code.
- vii. During the CIRP period, the management of the Corporate Debtor shall vest in the IRP or the RP, as the case may be, in terms of section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this Order, in default of which coercive steps will follow.
- viii. The IRP/RP shall submit to this Adjudicating Authority periodical reports with regard to the progress of the CIRP in respect of the Corporate Debtor.

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- ix. The Financial Creditor shall initially deposit a sum of ₹4,00,000/- (Rupees Four lakh only) with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC). Further, the Fees of the IRP will be subject to the approval of the COC in accordance with Notification No. IBBI/2022-23/GN/REG091 dated 13.09.2022, issued by the Insolvency and Bankruptcy Board of India, as published in the in the Official Gazette.
- x. In terms of section 7(5)(a) of the Code, Court Officer of this Court is hereby directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the IRP by Speed Post and email immediately, and in any case, not later than two days from the date of this Order.
- xi. Additionally, the Financial Creditor shall serve a copy of this Order on the IRP and on the Registrar of Companies, West Bengal, Kolkata by all available means for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this order.
- 8.13 **CP (IB) No. 309/KB/2022** to come up on **6th Jan 2024** for filing the progress report.
- 8.14 A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Rohit Kapoor
Member (Judicial)

Signed on this, the 15th day of December, 2023

SM(LRA)