

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT-II

CP(IB) 238 (IB)2024

Under section 7 of the Insolvency and
Bankruptcy Code, 2016

IN THE MATTER OF

Balaji Construction Co.

Lalita Apartments, Kamaal Chowk, Near
Rajput Restaurant, Indora, Nagpur.

... Financial Creditor

V/s.

Swastish Enterprises Limited

8, Vijaykiran Appartment Tidke Colony,
Nashik, Maharashtra, India, 422002.

... Corporate Debtor

Order delivered on :- 04.07.2024

Coram:

Hon'ble Shri Kuldip Kumar Kareer, Member (Judicial)

Hon'ble Shri Anil Raj Chellan, Member (Technical)

Appearances:

For the Financial Creditor : PCS, Nithish Bangera

For the Corporate Debtor : PCS, Vijay Kumar Tiwari

ORDER

Per: - Kuldip Kumar Kareer, Member (Judicial)

1. This Company petition is filed by Balaji Construction Co. (hereinafter called "**the Petitioner**") seeking to initiate Corporate Insolvency Resolution Process (**CIRP**) against Swastish Enterprises Limited

(hereinafter called “**Corporate Debtor**”) alleging that the Corporate debtor committed default in making payment to the Petitioner. This petition has been filed by Financial Creditor invoking the provisions of Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter called “**Code**”) on the ground that the Corporate Debtor has failed to make payment of a sum of Rs. 5,10,55,945.21 as on 31.12.2023/-.

The submissions by the Financial Creditor:-

2. The Financial Creditor had sanctioned a friendly loan to M/s. Swastish Enterprises Limited in the month of September, 2022, as the Corporate Debtor was in the need of initial working capital. In this regard, the Petitioner executed a “Friendly Loan Agreement” with the Corporate Debtor on 01.09.2022. The Corporate Debtor also executed a Demand Promissory Note dated 01.09.2022 in favour of the Petitioner.
3. Pursuant to the execution Friendly Loan Agreement and on the assurances made by the Corporate Debtor, the Petitioner/Financial Creditor duly disbursed a sum of Rs. 1,40,00,000/- to the Corporate Debtor from 15.09.2022 to 08.12.2022. In accordance with the said “Friendly Loan Agreement”, the Corporate Debtor was mandated to repay the principal sum with interest @ 12% p.a. within nine months from the first date of disbursement i.e., by 15.06.2023. In accordance with the clauses of the Friendly Loan Agreement, the Corporate Debtor had to repay the entire amount within a period of nine months from date of first disbursement i.e., by 15.06.2023. In the event of the default by the Corporate Debtor, the Financial Creditor submits that it is entitled to charge a fixed penalty of Rs. 2,00,000/- for each day of the default, subject to maximum penalty of Rs. 3,50,00,000/-.
4. The Corporate Debtor defaulted in making repayment of the principal sum with interest, after the lapse of nine months on 15.06.2023, which is

in contravention to the terms and conditions of the Friendly Loan Agreement.

5. Thereafter, the Petitioner immediately sent a Letter dated 16.06.2023 calling upon the Corporate Debtor for repayment. However, no response was received from the Corporate Debtor. Thereafter, the Petitioner sent subsequent reminders on 31.07.2023 and 04.09.2023 and thus, provided multiple opportunities to the Corporate Debtor for repayment, but the latter did not pay the outstanding dues. Finally, the Financial Creditor was constrained to send a Notice dated 26.12.2023, whereby the Financial Creditor invoked the Demand Promissory Note given by the Corporate Debtor and called upon the Corporate Debtor to make the repayment within a period of 7 days from receipt of the Notice but to no avail. The Petitioner sent a final reminder to the Corporate Debtor on 04.01.2024, informing the Corporate Debtor that in view the event of non - repayment, the Petitioner would take necessary legal steps.
6. The Petitioner/ Financial Creditor has submitted that the Corporate Debtor is liable to pay a total amount of Rs. 5,10,55,945.21/- (Rupees Five Crores Ten Lakhs Fifty - Five Thousand Nine Hundred Forty-five and Paise Twenty - One Only) as on 31.12.2023 along with future interest charged @ 12% p.a. from 01.01.2024 onwards. Hence, the present Company Petition u/s 7 of the IB Code, 2016.

Reply filed by the Corporate Debtor:-

7. It is submitted that in the reply that at the very outset, the captioned Company Petition, as filed u/s 7 of the Insolvency and Bankruptcy Code, 2016, is not maintainable in the eyes of law and the same must be dismissed immediately with exemplary cost by this Adjudicating Authority. It is further submitted that the captioned petition has been filed by Balaji Construction Co, which is a Hindu Undivided Family

(HUF) through its Karta Sanjay Tarachand Hardwani. It is further submitted that no express provision of the Insolvency and Bankruptcy Code, 2016 permits the filing of such Petition u/s 7 of the Code, 2016 by a HUF. Therefore, on this very ground, the captioned Petition is liable to be rejected.

8. It is further submitted that the Respondent is facing certain adverse financial situations and in such a scenario, the Respondent is ready and willing to pay a total amount of Rs. 50,00,000/- towards full and final settlement to the Petitioner, which is much more than what the Petitioner may recover on pushing the Respondent into the rigors of Corporate Insolvency Resolution Process.
9. Further, it is a settled position of law that the Insolvency and Bankruptcy Code, 2016 is not a forum for recovery of dues and objective of the Insolvency and Bankruptcy Code, 2016 is to try and keep the Corporate Debtor as a going concern.
10. Hence, the captioned Petition must be dismissed with exemplary costs, in order to deter the Petitioner from adopting such recovery measures under the guise of proceedings under the Insolvency and Bankruptcy Code, 2016.

Analysis and Findings:-

11. We have heard the Counsel for the parties and have gone through the records.
12. The factum of advancement of loan of this case is not disputed by the Corporate Debtor in the reply filed by it. It has also not been disputed that the Corporate Debtor executed a Friendly Loan Agreement dated 01.09.2022 in favour of the Petitioner. As per this document, a loan of Rs. 1.40 crores were advanced to the Corporate Debtor and the latter

agreed to pay nominal interest at the rate of 12% per annum. As per clause 3 of the loan agreement, the loan was to be repaid by the Corporate Debtor on completion of 9 months from the date of first disbursement. Thus, the loan was repayable after 9 months from the date of disbursement and the due date for the repayment of the loan was 15.06.2023.

13. The Petitioner has further claimed that the Corporate Debtor has not repaid the loan despite notices and reminders issued in this regard which are annexed with the Petition as Exhibit-G, Exhibit-H and Exhibit-I respectively. The Petitioner has further relied upon NeSL report, (Exhibit-L) which also states that the expiry date of the loan was 15.06.2023. Therefore, there remains not even an iota of doubt that a loan of Rs. 1.40 crores were advanced to the Corporate Debtor which was repayable with interest on 15.06.2023.
14. During the course of arguments, the only objection raised by the Counsel for the Corporate Debtor is that the Petition is not maintainable as the same has been filed by the Petitioner, which is an HUF, and as per the provisions of the IB Code, 2016, HUF is not entitled to file a Petition u/s 7 of the IB Code, 2016.
15. We have considered the objections raised on behalf of the Corporate Debtor. As per Section 5(7) of the Code, Financial Creditor means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to. The 'person' as defined in Section 3(23) includes HUF. Hence, we are of the considered view that there is no bar under any law which might provide that an HUF entity is not entitled to file and prosecute a Petition u/s 7 of the Code, 2016. In this context, a reference can also be made to Sapan Mohan Gard (HUF) vs. Wianxx Impex Pvt. Ltd. in CP(IB) 975(ND)2018 decided by

NCLT, Delhi vide order dated 02.01.2019 whereby it was held that an HUF being as distinct an entity as an individual, is entitled to initiate CIRP against the Corporate Debtor for its inability to liquidate its debt and further that the Karta does not need the consent of other coparceners to proceed with matters which are in the best interest of the HUF. In the light of the law laid down in the aforesaid case, it can be safely held that a Petition u/s 7 of the Code, 2016 can be maintained by an HUF.

16. No other pointes have been raised by the Counsel for the Corporate Debtor who only argued that the Corporate Debtor is ready to settle the claim of the Petitioner/Financial Creditor by paying a sum of Rs. 50 lakhs toward full and final claim of the Financial Creditor. However, this offer was not acceptable to the Counsel for the Petitioner. Even otherwise the argument raised on behalf of the Corporate Debtor amounts to admission of the financial debt on the part of the Corporate Debtor. Apart from that, the loan was advanced on 01.09.2022 for a period of 9 months and the same fell due on 15.06.2023, which is the date of default. Thus, the present Petition, which was filed on 20.03.2024 is well within the period of limitation.
17. As a result of the above discussion, we hold that the Petitioner has been able to establish the existence of financial debt and its default having been committed by the Corporate Debtor and further that the Petition is well within the period of limitation and, therefore, we find it to be a fit case for admission u/s 7 of the Code, 2016, it is ordered accordingly in the following terms:

ORDER

- a. **The above Company Petition No. (IB) - 238(MB)/2024 is hereby admitted** and initiation of Corporate Insolvency Resolution Process (CIRP) is

ordered against **Swatish Enterprises Limited.**

- b. This Bench hereby appoints Mr. Harshad Shamkant Deshpande, Registration No: IBBI/IPA-001/IP-P-00166/2017-18/10335 as the Interim Resolution Professional having registered office at 403, Kumar Millennium, Shivatirtha Nagar Kaman, Opp Krishna Hospital, Paud Road, Kothrud, Pune, Maharashtra- 411038, Phone no. +91 8208469919 email :- harshad_de@hotmail.com, to carry out the functions as mentioned under the Insolvency & Bankruptcy Code, 2016.
- c. The Financial Creditor shall deposit an amount of Rs. 3 Lakhs towards the initial CIRP cost by way of a Demand Draft drawn in favour of the Interim Resolution Professional appointed herein, immediately upon communication of this Order.
- d. That this Bench hereby prohibits 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; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial

Assets and Enforcement of Security Interest Act, 2002; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.

- e. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- f. That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- g. That the order of moratorium shall have effect from the date of pronouncement of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.
- h. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
- i. During the CIRP period, the management of the Corporate Debtor will vest in the IRP/RP. The suspended directors and employees of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.

- j. Registry shall send a copy of this order to the concerned Registrar of Companies for updating the Master Data of the Corporate Debtor.

Accordingly, this Petition is admitted.

The Registry is hereby directed to communicate this order to both the parties and to IRP immediately.

Sd/-

ANIL RAJ CHELLAN
Member (Technical)

Sd/-

KULDIP KUMAR KAREER
Member (Judicial)

ANKIT